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THE CHARLES STREET JAIL LITIGATION: THE ALLOWABLE EXTENT OF FEDERAL JUDICIAL INVOLVEMENT

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I. INTRODUCTION

In the past decade federal district courts have, under a grant of equity power extended to them by Section 1983 of the Civil Rights Act of 1871,[1] become involved in an increasing number of prison and jail[2] reform cases. These cases are representative of public law litigation, the analysis of which is facilitated by the public law litigation model.[3] Under the public law litigation model federal district court

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[1] 42 U.S.C. § 1983 (1970). This section, as amended provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The parallel jurisdictional provision, 28 U.S.C. § 1343(3), (4) (1976), provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:. . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[2] Generally, convicted prisoners are incarcerated in state operated prisons while detainees are housed in jails owned and maintained by cities and counties. *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 943 (1970).

[3] The public law litigation model was developed by Professor Abram Chayes of Harvard University and is presented in Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For elaborations of this model see: Note, *Implementation Problems In Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Special Project, *The Remedial Process In Institutional Reform Litigation*, 78 COL. L. REV. 784 (1978).

judges, in an effort to insure compliance with the Constitution, assume an expansive role in decree formulation, implementation and enforcement.[4] Moreover, under this model the litigation is divided into two stages: the right-violation stage, in which the court determines whether a protected right has been violated, and the remedy stage, in which the judge issues an extensive remedial decree and assumes a central monitoring and enforcement role in securing its implementation.[5]

In prison and jail reform cases, remedial decrees generally order either the correction of the unconstitutional conditions within the facility, or the closing of the offending institution.[6] Initial reliance for implementation of the decree rests on the good faith of the parties.[7] However, if the responsible legislative and executive officials of state and local government are unwilling or unable to comply with the decree, the judge is forced to assume an activist role which tests the extent of the remedial powers of the lower federal courts.[8]

In *Inmates of the Suffolk County Jail v. Eisenstadt*[9] *(Inmates I)*, a federal district court in Massachusetts found violations of the constitutional rights of pretrial detainees incarcerated in Boston's Charles Street Jail. The court held that these violations were too extensive to be remedied in a piecemeal fashion within the confines of the existing jail and, therefore, ordered the defendant-officials to close the jail by June 30, 1976.[10] However, due to complex legal and political problems, many of which typify the problems involved in the implementation of public law remedial decrees, the Charles

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[4] *Id.*

[5] See text at notes 87-96, *infra*. *See also* Chayes, *supra* note 3, at 1284. For an explanation of the division between the right-violation and the remedy stages of the litigation, *see id.* at 1293-94; *see also* Special Project, *supra* note 3, at 790. For a particularly well developed and illuminating discussion of equitable remedies in public law litigation, *see* Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978).

[6] Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 375-76 (1977).

[7] Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304, 309 (8th Cir. 1971); *see also*, Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Goldstein, *supra* note 5, at 66.

[8] For case studies of the implementation of four prison and jail remedial decrees, *see* M. HARRIS & D. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977). *See generally* Johnson, *The Constitution and The Federal District Judge*, 54 TEX. L. REV. 903 (1976).

[9] 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974), *aff'd as modified*, 518 F.2d 1241 (1st Cir. 1975).

[10] 360 F. Supp. at 691.

Street Jail remains unrenovated and yet is still in operation.[11]

This article discusses the Charles Street Jail litigation in light of the equitable power of federal courts and the public law litigation model. The first section examines the equity provision of Section 1983 of the Civil Rights Act of 1871 and its use as a vehicle for plaintiffs seeking a federal remedy for civil rights violations by state or local officials. Next, the article examines how the federalist principle of deference to local control of institutions limits equitable remedies in civil rights suits; the school desegregation cases of the past three decades serve as the precedent for federal court involvement in situations where local officials have failed to remedy civil rights violations. The article then presents the public law litigation model as a basis for the analysis of cases involving both school desegregation and the conditions inside prisons and jails. Finally, this model is applied to the Charles Street Jail litigation.

II. The Equitable Power of Federal Courts in Civil Rights Cases

The history of federalism reflects an attempted balance between state autonomy and the protection of individual liberties. Prior to the Civil War, the states enjoyed considerable autonomy, reflecting the federalists' fear of a tyrannical, centralized government.[12] Since the states and their citizens supposedly shared common interests, the states were considered the safest receptacle for individual liberties.[13] The Civil War, however, shattered that belief.[14] Through such

[11] Since the Charles Street Jail litigation is so protracted, this article will discuss the litigation only through October 2, 1978. However, it should be noted that on May 7, 1979 the attorneys for all parties to this litigation and Judge Garrity signed a consent decree, Inmates of the Suffolk County Jail v. Kearney, No. 71-162-G (D. Mass. May 7, 1979), which provides that the defendants will construct, maintain and operate a new pretrial detention facility on the Charles Street Jail site. Moreover, the new facility will be "designed and built according to the standards and specifications contained in the 'Suffolk County Detention Center, Charles Street Facility Architectural Program' date January 1, 1979 . . ." with certain modifications which are listed in the consent decree. *Id.* at 2. Issuance of this consent decree was the last action on the Charles Street Jail litigation by Judge Garrity. Due to the appointment and confirmation of four new federal district court judges in Massachusetts (N.Y. Times, March 22, 1979 at A7, col. 1) the Charles Street Jail litigation will hereinafter be heard by Judge Robert E. Keeton.

[12] *See generally* Comment, *Theories of Federalism and Civil Rights,* 75 Yale L.J. 1007 (1966).

[13] For example, Federalist No. 46 noted:

> Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that *the first and most natural attachment of the people will be to the governments of their respective States.* Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and

legislative enactments as the Civil Rights Act of 1871,[15] the federal government became the new protector of individual liberties, and has continued in that capacity from Reconstruction through the federal courts' involvement in civil rights litigation during the past three decades.

A. Section 1983 of the Civil Rights Act of 1871

Section 1983 (now 42 U.S.C. § 1983) initially appeared as part of the Ku Klux Act of 1871,[16] passed by a Congress concerned with the violence of the Ku Klux Klan and the inability of state governments to curb its activities.[17] The purpose of the Act was as follows:

> to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[18]

Within this context, Section 1983 has three main goals: (1) to give the federal district courts power to override discriminatory state laws;[19] (2) to provide a federal remedy where the state law is inadequate;[20] and (3) to provide a remedy when local officials fail to use their authority to remedy constitutional violations.[21]

The provision in Section 1983 which allows for "suit[s] in equity"[22] supplies lower federal court judges with the degree of flexibil-

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> emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these will a greater proportion of the people have ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

THE FEDERALIST No. 46 (J. Madison) (The New American Library of World Literature 1961), at 294-95 (emphasis added). In another essay appearing in THE FEDERALIST, Hamilton wrote: "[T]he State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority." THE FEDERALIST No. 28 (A. Hamilton). *Id.*, at 181.

[14] *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) (hereinafter cited as *Developments In the Law*).

[15] 42 U.S.C. § 1983 (1970); see text of Section 1983 at note 1, *supra*.

[16] Act of April 20, 1871, 42d Cong., 1st Sess. ch. 22, 17 Stat. 13.

[17] Monroe v. Pape, 365 U.S. 167, 171-76 (1961).

[18] *Id.* at 180.

[19] *Id.* at 173.

[20] *Id.*

[21] *Id.* at 174.

[22] See text of Section 1983 at note 1, *supra*.

ity necessary to effectuate adequate remedies for constitutional violations. The equity power of a court is well suited for this task because it is designed to insure that no wrong is suffered without a remedy.[23] Therefore, once a federal court finds that a protected right has been violated it may invoke its broad and flexible equity power in order to remedy the violation.[24]

Despite the broad potential of Section 1983 actions brought in federal court seeking to redress violations of individual rights by state officials, the section was rarely used prior to the 1940's.[25] However, during that decade the Supreme Court resurrected Section 1983 in two cases in which it interpreted the provision making the section applicable to any person acting "under color of law"[26] to include persons acting "under 'pretense' of law." Aided by this liberal interpretation, the Court in *United States v. Classic*[27] reversed a dismissal of charges against election officials who had fraudulently counted ballots in a primary, and in *Screws v. United States*[28] held a sheriff's fatal beating of a prisoner violative of Section 1983. Thus, despite the fact that no state law actually sanctioned the defendant's conduct and such conduct was, in fact, violative of state law, these cases nevertheless granted federal courts jurisdiction to provide redress.

Section 1983 emerged again in a 1961 suit concerning an unreasonable search by Chicago policemen acting "under color of law."[29] After a discussion of the legislative history of Section 1983 and an enumeration of its goals, the Court noted that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[30] Subsequent to this case, the number of Section 1983 actions increased dramatically, with many individuals seeking redress for civil rights violations.[31]

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[23] 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 423-24 (5th ed. S. Symons 1941).

[24] See quotations in text at notes 57 and 63, *infra*.

[25] *Developments in the Law*, *supra* note 14, at 1161.

[26] See text of Section 1983 at note 1, *supra*.

[27] 313 U.S. 299 (1941).

[28] 325 U.S. 91 (1945).

[29] Monroe v. Pape, 365 U.S. 167 (1961).

[30] *Id.* at 183.

[31] In 1960 a total of 280 Section 1983 suits were filed, while in 1972 this number increased to 8,000. *Developments in the Law*, *supra* note 14, at 1172. In 1976, of a total of 140,189 civil actions filed in federal court, 12,911 were general civil rights actions and 6,341 were state prisoner rights actions brought under Section 1983. ADMINISTRATIVE OFFICE OF THE UNITED

B. Federal Equity Power at the Remedy Stage

Despite the fact that Section 1983 has been broadly construed to control the actions of any individual acting "under 'pretense' of law" the longstanding notion of federal deference to local control of institutions has limited the power of federal courts to order intrusive remedies in institution reform cases. In the context of prison and jail reform litigation, this notion has been responsible for "[t]he traditional 'hands-off' doctrine, holding that federal courts are powerless to interfere with the operation of state and county correctional institutions . . . ."[32] Although recent recognition of the outrages existing in prisons and jails has caused the "hands-off" doctrine to partially give way to federal court action where constitutional violations exist,[33] nevertheless the notion of federal deference to local control of institutions remains a limitation on the power of a federal court to order intrusive remedies. The effect of this limitation on remedial power has been particularly apparent in the context of school desegregation cases. The Supreme Court has noted that "[n]o single tradition . . . is more deeply rooted than local control over the operation of schools . . .,"[34] so that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the constitution."[35]

1. "Our Federalism" — An Expansion of Federal Deference to Local Control of Institutions

The notion of federal deference to local control of institutions is rooted in federalism,[36] a doctrine which concerns the degree of au-

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STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR 86, *cited in Developments in the Law, supra* note 14, at 1136 n.7.

[32] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973).

[33] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), 466 F. Supp. 628 (M.D. Ala. 1979) (receivership ordered).

[34] Milliken v. Bradley, 418 U.S. 717, 741 (1974) (Milliken I).

[35] Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (Milliken II).

[36] Goldstein, *supra* note 5, at 6. The principle of federal court deference to local control of institutions also stems from the doctrine of separation of powers. However, separation of powers is generally applied to the executive, legislative, and judicial branches of the same level of government. *Id.* at 7-8 n.43. For an analysis of the position that separation of powers limits the authority of federal courts to order remedies which interfere with local governmental functions, *see* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

tonomy from federal interference retained by the states. In a number of recent decisions articulating "Our Federalism,"[37] the United States Supreme Court has expanded the scope of state autonomy and, consequently, limited the scope of federal remedies of constitutional violations. The Court first articulated this concept in *Younger v. Harris,*[38] holding that, absent a bad faith prosecution, harrassment or unusual circumstances, federalism and comity bar federal court injunctions of pending state criminal proceedings. In *Rizzo v. Goode,*[39] the Court extended the concept of federalism in order to restrict federal interference with the actions of local officials. In *Rizzo* a group of black residents of Philadelphia brought a Section 1983 class action alleging a pattern and practice of police misconduct in that city. The federal district court, finding the existence of such a pattern and practice, issued a mandatory injunction compelling the City Police Commissioner to effectuate a court-ordered method for handling citizen complaints.[40] However, the Supreme Court reversed, holding that, since the plaintiffs had failed to link the supervising city and police department officials to the incidents of misconduct of their subordinates, no constitutional violation existed.[41] In addition the Court noted that, barring "extraordinary circumstances,"[42] principles of federalism prevent the issuance of federal injunctions not only against state judicial proceedings but against state officials as well.[43]

The *Rizzo* holding lacks support in a study of the history of federalism. In *The Federalist Papers,* James Madison wrote: "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."[44] In Madison's view, federal power comes directly from the people and not derivatively from the people

[37] Francis v. Henderson, 425 U.S. 536 (1976); Meachum v. Fano, 427 U.S. 215 (1976); National League of Cities v. Usery, 426 U.S. 833 (1976); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Simon v. Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Stone v. Powell, 428 U.S. 465 (1976); Hicks v. Miranda, 422 U.S. 332 (1975); Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971).

[38] 401 U.S. 37, 54 (1971).

[39] 423 U.S. 362 (1976).

[40] COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd,* 506 F.2d 542 (3d Cir. 1974).

[41] *Id.* at 371.

[42] *Id.* at 379.

[43] *Id.* at 380.

[44] THE FEDERALIST No. 46 (J. Madison)(The New American Library of World Literature 1961), at 294.

through the states. Such a conception of federalism is necessarily antithetical to the holding of *Rizzo*. *Rizzo* assumes that federal power must be constricted in order to expand state power and thereby preserve the people's freedom. However, Madison's views portray both the states and the federal government as direct guarantors of personal liberty, so that neither entity's powers should be restrained unless directly needed to secure individual rights.[45]

In order to determine that no constitutional violation existed, the Court in *Rizzo* focused on the language of Section 1983 which provides that "[e]very person who, under color of [law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . ."[46] Thus the Court found that the requirements for Section 1983 liability had not been met because:

> there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or approval of such misconduct.[47]

However, the Court's requirement that the plaintiffs show a "plan or policy" of police misconduct contravenes the goals of Section 1983. This section is applicable to *Rizzo* since the "under color of law" provision includes acts of both local officials and their subordinates.[48] First, the district court's finding of acts of racial discrimination "with such frequency that they cannot be dismissed as rare, isolated instances; and that little or nothing is done by the city authorities to punish such infractions or to prevent their recurrence,"[49] indicates that *Rizzo* actually involved the failure of local officials to enforce state laws for the protection of individual rights; such a situation is precisely the problem which Section 1983 was intended to rectify.[50] Additionally, the district court's remedy ordering the institution of a method for handling citizen complaints did

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[45] *See generally,* Michelman, *States' Rights and States' Rules: Permutations of "Sovereignty" in National League of Cities v. Usery,* 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1065 (1977).

[46] Rizzo v. Goode, 423 U.S. 362, 370 (1976). *See also* text of Section 1983 at note 1, *supra.*

[47] Rizzo v. Goode, 423 U.S. 362, 371 (1976).

[48] Monroe v. Pape, 365 U.S. 167, 187 (1961), *cited in* Rizzo v. Goode, 423 U.S. 361, 384 (1976) (Blackmun, J., dissenting).

[49] Rizzo v. Goode, 423 U.S. 362, 386 (1976) (Blackmun, J., dissenting).

[50] See text at note 21, *supra.*

not excessively intrude into the local control of the police department and was enforceable within the structure of that institution.[51]

The deprivation of individual liberties to which a strict application of *Rizzo's* federalism would lead can be avoided through a narrow construction of that holding. In a case challenging the conditions of confinement in the District of Columbia Jail, the Circuit Court of Appeals for the District of Columbia did so construe the *Rizzo* holding:

> *Rizzo* actually holds that a federal court should refrain from assuming a comprehensive supervisory role via its injunctive powers over broad areas of local government for the purpose of preventing speculative and probably only sporadic future misconduct by local officials toward an imprecise class of potential victims, especially when that misconduct is not part of a pattern of persistent and deliberate official policy.[52]

Thus, under the Circuit Court's interpretation, a court is still free either to assume a limited supervisory role, or to enjoin widespread civil rights violations or to intervene where a pattern of police misconduct exists. Furthermore, since the Supreme Court held that no constitutional violation existed in *Rizzo,* a lower federal court may be justified in characterizing and dismissing *Rizzo's* federalism language as mere dicta. Consequently, despite the expansion of state autonomy, the concept of federalism does not preclude the intrusion of federal courts, to some degree, into state affairs in order to remedy constitutional violations. The amount of intrusion permissible is defined in the school desegregation cases.

2. Federal Remedial Power Employee in School Desegregation Cases

The remedies ordered in the school desegregation cases of the past three decades closely paralleled those ordered in suits concerning the conditions within prisons and jails—both in terms of the equity power which the federal courts employed and in terms of the limitations on that power.[53] In the landmark case of *Brown v. Board of Education*[54] *(Brown I),* the Supreme Court held that the Kansas school segregation laws denied the complainant class of black stu-

[51] Rizzo v. Goode, 423 U.S. 362, 387 (1976) (Blackmun, J., dissenting).

[52] Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1978). For a similar perfunctory treatment of *Rizzo, see* Hoss v. Cuylor, 452 F. Supp. 256, 298 (E.D. Pa. 1978).

[53] *See generally* Special Project, *supra* note 3, at 788 n.9.

[54] 347 U.S. 483 (1954).

dents equal protection of the laws. After re-argument on the issue of relief, the Supreme Court, in *Brown II*,[55] remanded the case to the district court to enter whatever orders were "necessary and proper to admit [complainants] to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ."[56] The general equity power articulated by the Court in *Brown II* became the authority for future decisions based on the *Brown I* mandate:

> the essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of each particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustments and reconciliation between the public interest and private needs as well as between competing private claims.[57]

The intransigence of local officials forced the lower federal courts in later desegregation cases to order intrusive equitable remedies in order to enforce the *Brown I* mandate.[58] For example, in *Griffin v. County School Board of Prince Edward County*,[59] resistance to desegregation motivated the school board of Prince Edward County, Virginia to close public schools, to supply tuition grants to white children attending private segregated schools and to give tax rebates to contributors to these private schools. In an effort to remedy this resistance, the Supreme Court affirmed the district court's order both enjoining the county from making these tuition grants and tax exemptions and requiring that local schools be opened as long as other public schools in the state remained open.[60] Most significantly, the Court authorized the district court to require the county to levy taxes for the purpose of operating public schools.[61]

The *Griffin* court's extremely intrusive order was not an isolated instance of the use of equitable power. Rather, district courts repeatedly ordered intrusive remedies even when faced with lesser degrees of resistance on the part of local officials. For example, in *Swann v. Charlotte-Mecklenburg Board of Education*,[62] the Court

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[55] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[56] *Id.* at 301.

[57] Brown v. Bd. of Educ., 349 U.S. 294, 300 n.5 (1955), *citing* Hecht v. Bowles, 321 U.S. 321, 329-30 (1944).

[58] *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 244-72 (1962).

[59] 377 U.S. 218 (1964).

[60] *Id.* at 222-25.

[61] *Id.* at 233.

[62] 402 U.S. 1 (1971).

reiterated the nature of a federal district court's equitable power and further clarified the degree of local intransigence which warranted exercise of that power:

> if school authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[63]

Employing these broad equitable powers, the Court ended seven years of litigation by affirming an extensive lower court order mandating busing, which required the Board of Education to expend additional sums amounting to one and one half percent of the total district budget.[64]

In *Swann* the Court announced the proposition that "the nature of the violation determines the scope of the remedy."[65] Thus, narrowly construing the nature of the violation will likewise limit the scope of the remedy. This was the result in *Milliken v. Bradley*[66] *(Milliken I),* where the Court utilized both a narrow characterization of the nature of the violation[67] and the principle of federal deference to local control of public education[68] in order to defeat an interdistrict busing order aimed at remedying segregation in the Detroit city schools. The district court in *Milliken I* based its order for an interdistrict remedy on the twin findings that the state of Michigan was responsible under the State Constitution for the operation of the entire Detroit school system and that the dense black population in the city of Detroit, coupled with the prospect of "white flight," would render an intradistrict plan ineffective.[69] The Supreme Court, narrowly construing the nature of the violation, held that the desegregation remedy must be aimed at "the condition alleged to offend the Constitution—the segregation within the De-

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[63] *Id.* at 15.

[64] Dell'Ario, *Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?*, 2 HASTINGS CONST. L. Q. 113, 121 (1975). The plan ordered by the district court was a synthesis of a plan proposed by the school board for the junior and senior high schools and one proposed by a court appointed expert for the elementary schools. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 9 (1971).

[65] *Id.* at 16.

[66] 418 U.S. 717 (1974).

[67] *See id.* at 744-45.

[68] *Id.* at 743-44.

[69] Bradley v. Milliken, 338 F. Supp. 582, 585-86 (E.D. Mich. 1971).

troit City School District."[70] The Court further held that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[71] Thus, after a remand, the Court, in *Milliken v. Bradley*[72] *(Milliken II),* ended almost six years of litigation over the remedy[73] by affirming an intradistrict busing order. Nonetheless, since the intradistrict scope of the remedy now fit the Court's characterization of the nature of the violation, the Court affirmed other wide-ranging aspects of the district court order such as remedial educational programs, in-service training for teachers, an alternative testing program and counselling and career guidance geared toward the problems of school children undergoing desegregation.[74]

In *Dayton Board of Education v. Brinkman*[75] the Court also based its reversal of a district court desegregation order on a restrictive characterization of the nature of the violation. The district court had found a "cumulative violation"[76] of the Equal Protection Clause in Dayton's racially imbalanced schools, optional attendance zones and certain decisions of the Board of Education.[77] After the Court of Appeals for the Sixth Circuit twice remanded district court orders finding the remedies insufficient,[78] the district court ordered, and the Sixth Circuit affirmed, a systemwide remedy including an extensive busing plan, pairing of schools, a variety of special programs and magnet schools.[79] The Supreme Court reversed, finding:

> the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.[80]

Thus, the Court held that the district court must determine the "incremental segregative effect"[81] of the School Board action and

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[70] *Id.* at 738.
[71] *Id.* at 745.
[72] 433 U.S. 267 (1977).
[73] *Id.* at 269.
[74] *Id.* at 272-88.
[75] 433 U.S. 406 (1977).
[76] *Id.* at 413.
[77] *Id.*
[78] Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974); 518 F.2d 853 (6th Cir. 1975).
[79] 433 U.S. 406, 408-09 (1977).
[80] *Id.* at 419.
[81] *Id.* at 420.

tailor its remedy to fit that effect.

The impact which *Dayton* will have on equitable remedies is unclear in light of *Milliken II*. *Dayton* and *Milliken II* were decided on the same day.[82] However, in *Milliken II* the Court implicitly rejected the analysis in *Dayton* by affirming four wide-ranging educational remedies, finding that they were "necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation."[83] Yet some of these educational remedies would not have passed the restrictive "incremental segregative effect" test of *Dayton*.[84] For example, the Court in *Milliken II* affirmed in-service training for teachers without finding that inadequacy among the teachers was the result of state discrimination.[85] Thus, in future cases, if the Court applies the broad test of *Milliken II* and the earlier desegregation cases, it will preserve flexibility in equitable remedies; however, if the Court applies the "incremental segregative effects" test of *Dayton*, it will greatly constrict the availability of equitable remedies.[86]

3. *The Public Law Litigation Model*

Suits seeking reform of prison and jail conditions, the school desegregation cases and other institution reform cases fit the model of public law litigation to varying degrees. This model separates the right-violation stage and the remedy stage.[87] Under this model,

> the party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—master, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the

[82] Milliken v. Bradley, 433 U.S. 267, 292 (1977) (Powell, J., concurring).

[83] *Id.* at 282.

[84] See text at notes 80-81, *supra*.

[85] Goldstein, *supra* note 5, at 42.

[86] *Id.* at 40-43.

[87] See text and note at note 5, *supra*.

judge's continuing involvement in administration and implementation.[88]

After the lower federal court judge determines that a constitutionally protected right has been violated, the judge engages in an implicit balancing process, weighing the plaintiff's constitutional rights with the defendant's right to control the operation of its institutions.[89] The judge then issues an initial decree which seeks to remedy the plaintiff's rights but which is sufficiently broad so that the parties may determine the details of compliance.[90] Next, the district court judge monitors compliance through a variety of unintrusive monitoring devices.[91] Throughout the monitoring stage of the litigation, the balance weighs in favor of deference to local control of the institution.[92] However, if the judge determines that the local officials have not attempted to achieve good faith compliance with the decree, then the constitutional rights of the plaintiffs outweigh the defendant's right to control its institutions, and the judge's role changes from that of mere monitor to that of enforcer of the initial decree.[93] Enforcement consists of formal actions which the court uses to expedite the defendant's compliance and which necessarily intrude upon local control of the institution.[94]

In the context of school desegregation, *Brown I* established the analytical framework for the right-violation and *Brown II* articulated the remedy. The *Brown II* remedy — desegregation with all deliberate speed — mandated vindication of the constitutional right yet was extremely vague and left implementation details to the district courts and local officials. Therefore, the court's initial decree was unintrusive and exhibited great deference to local control of the schools. In each of the subsequent school desegregation cases,

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[88] Chayes, *supra* note 3, at 1284.

[89] *Id.* at 1292-93. Chayes says that this balancing process is necessary due to "the prospective character of the relief [which] introduces large elements of contingency and prediction into the proceedings." *Id.* at 1292. *See also* Special Project, *supra* note 3, at 791, 864-66.

[90] Chayes, *supra* note 3, at 1292; Special Project, *supra* note 3, at 800-01, 869.

[91] These devices include: retention of jurisdiction; mandatory compliance reports; and use of monitors such as special masters, citizens' committees, expert panels, ombudsmen, lay advocates, and attorneys. Note, *supra* note 3, at 440-45. *See also* Special Project, *supra* note 3, at 815-37.

[92] Monitoring devices are unobtrusive and preserve the defendants' rights to local control of their institution.

[93] Enforcement mechanisms intrude into the defendants' rights to local control and thus can only be justified if based on a court determination that the plaintiffs' constitutional rights outweighed the defendants' rights to local control. Special Project, *supra* note 3, at 927-29.

[94] Note, *supra* note 3, at 448-53; Special Project, *supra* note 3, at 837-42.

the lower federal courts determined that the defendants had not tried to achieve good faith compliance with the *Brown II* mandate. After noting the defendant's noncompliance, the district courts sought to enforce the desegregation mandate by specifically characterizing the nature of the violations and ordering remedies which varied in intrusiveness.[95] As long as these intrusive remedies fit within the nature of the violation and were prompted by the defendant's recalcitrance, the Supreme Court held that they were allowable intrusions into local control.[96] In essence, as a result of the defendant's proven lack of good faith the equitable balance in each of these cases weighed in favor of immediate vindication of the plaintiff's rights through use of intrusive enforcement mechanisms.

III. The Charles Street Jail Litigation

In the past decade, lower federal courts have decided a tremendous number of suits seeking reform of prison[97] and jail[98] conditions.

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[95] Frug, *The Judicial Power of the Purse,* 126 U. Pa. L. Rev. 715, 762-67 (1978).

[96] See text at notes 54-86, *supra.*

[97] Federal courts have ordered major prison reform in the following cases: Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978); Williams v. Edwards, 546 F.2d 1206 (5th Cir. 1977); Parker v. Cook, 464 F. Supp. 350 (S.D. Fla. 1979); Jordan v. Robinson, 464 F. Supp. 223 (W.D. Pa. 1979); Burks v. Walsh, 461 F. Supp. 454 (W.D. Mo. 1978); Finney v. Mabry, 455 F. Supp. 756 (E.D. Ark. 1978), 458 F. Supp. 720 (E.D. Ark. 1978); Nelson v. Collins, 455 F. Supp. 727 (D. Md. 1978), *aff'd in part and remanded,* 588 F.2d 1378 (4th Cir. 1978); Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978), *aff'd in part and remanded,* 588 F.2d 1378 (4th Cir. 1978); M.C.I. Concord Advisory Board v. Hall, 447 F. Supp. 398 (D. Mass. 1978); Owen v. Schuler, 466 F. Supp. 5 (N.D. Ind. 1977); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), 448 F. Supp. 659 (D.R.I. 1978) (civil contempt order); Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977), 573 F.2d 118 (2d Cir. 1978), *cert. granted,* October 2, 1978, *reversed sub nom.* Bell v. Wolfish, 25 Crim. L. Rep. 3053 (May 16, 1978); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977); Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977); Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff'd,* 565 F.2d 48 (2d Cir. 1977); Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977); Bell v. Manson, 427 F. Supp. 450 (D. Conn. 1976), *rev'd and remanded,* 590 F.2d 1224 (2d Cir. 1978); Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976), *rev'd in part and aff'd in part,* 561 F.2d 411 (1st Cir. 1977), *remanded,* 581 F.2d 275 (1st Cir. 1978); Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976), 421 F. Supp. 740 (N.D. Ohio 1976), 431 F. Supp. 566 (N.D. Ohio 1977), 446 F. Supp. 1184 (N.D. Ohio 1977), 455 F. Supp. 1241 (N.D. Ohio 1978); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), 466 F. Supp. 628 (M.D. Ala. 1979) (receivership ordered); Costello v. Wainright, 497 F. Supp. 20 (M.D. Fla. 1975), *vacated on other grounds,* 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded,* 430 U.S. 325 (1977); Bell v. Hall, 392 F. Supp. 274 (D. Mass. 1975); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd,* 564 F.2d 388 (10th Cir. 1977) (improper conditions ordered rectified), 457 F. Supp. 719 (E.D. Okla. 1978); Holt v. Hutto, 363 F. Supp. 194 (E.D Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th

Such suits fit, to varying degrees, the public law litigation model. The Charles Street Jail litigation illustrates the potential for the operation of this model in a jail setting. The presiding judge, Massachusetts Federal District Court Judge W. Arthur Garrity, Jr., first found that the conditions in the jail violated the inmates' due process rights and then engaged in a balancing process to determine the scope of the initial remedial decree. The court was wary of excessively intruding into local control of the jail and with this as its basis continued to balance the interests of the parties throughout the monitoring stage and, thereafter, during the court's direct enforcement of its decree. Although Judge Garrity's enforcement device might be viewed as ultimately effective because it pressured the defendants to propose and approve a plan for construction of a new jail,[99] the court's overall treatment of this case will probably be

Cir. 1974), *aff'd*, Hutto v. Finney, 437 U.S. 678 (1978); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), 407 F. Supp. 1117 (N.D. Miss. 1975), 423 F. Supp. 732 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977), 454 F. Supp. 567 (N.D. Miss. 1978); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part, rev'd in part*, 503 F.2d 1321 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), 466 F. Supp. 628 (M.D. Ala. 1979) (receivership ordered); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[98] Federal courts have ordered major jail reform in the following cases: Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977); Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Lock v. Jenkins, 464 F. Supp. 541 (N.D. Ind. 1978); Rutherford v. Pitchess, 457 F. Supp. 104 (C.D. Cal. 1978); Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978), 457 F. Supp. 984 (W.D. Pa. 1978); Stewart v. Gates, 450 F. Supp. 583 (C.D. Cal. 1978); Vest v. Lubbock County Comm'rs Court, 444 F. Supp. 824 (N.D. Tex. 1977); Ambrose v. Malcolm, 440 F. Supp. 51 (S.D.N.Y. 1977); O'Bryan v. County of Saginaw, 437 F. Supp. 582 (E.D. Mich. 1977), 446 F. Supp. 436 (E.D. Mich. 1978); Ahrens v. Thomas, 434 F. Supp. 873 (W.D. Mo. 1977), *aff'd in part, modified in part*, 570 F.2d 286 (8th Cir. 1978); Inmates of Henry County Jail v. Parham, 430 F. Supp 304 (W.D. Ga. 1976); Moore v. Janing, 427 F. Supp. 567 (D. Neb. 1976); Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976); Tate v. Kassulke, 409 F. Supp. 651 (W.D. Ky. 1976); Sykes v. Kreiger, 451 F. Supp. 421 (N.D. Ohio 1975); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *modified in part and remanded*, 392 F. Supp. 515 (M.D. Fla. 1975), *modified*, 563 F.2d 741 (5th Cir. 1977); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd and remanded*, 507 F.2d 333 (2d Cir. 1974), *judgment entered*, 389 F. Supp. 964 (S.D.N.Y. 1975), *modified*, 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd per curiam*, 527 F.2d 1041 (2d Cir. 1975), 432 F. Supp. 769 (S.D.N.Y. 1977) (denying motion to reopen institution); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973), 429 F. Supp. 370 (W.D. Mo. 1977) (amended consent judgment approved); Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd in part*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971), 358 F. Supp. 338, 361 F. Supp. 1235 (E.D. Ark. 1973); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), 440 F. Supp. 60 (N.D. Ohio 1977); Hamilton v. Shiro, 338 F. Supp. 1016 (E.D. La. 1970).

[99] See text at notes 239-262, *infra*. See also note 11, *supra*.

viewed as ineffective because after six years of remedy formulation the plaintiffs are still confined in unconstitutional conditions within the Charles Street Jail. Resolution of the Charles Street Jail litigation might have been expedited if the court had fully employed the public law litigation model.

A. Right-Violation Stage: The Constitutional Violation

The Charles Street Jail litigation began in 1971 with the filing of a Section 1983 class action on behalf of all the inmates housed at Boston's Suffolk County Jail (Charles Street Jail), challenging the constitutionality of the conditions in the jail.[100] The merits of that challenge were decided in 1973.[101] The Charles Street Jail has been in use since 1848 and is both the oldest public building still utilized in Boston and one of the oldest jails in the country.[102] In its findings of fact the district court noted that the jail consists of four wings which meet at an open, central, rectangular rotunda. The north, south and east wings house male inmates and the west wing contains administrative offices, medical facilities and an auditorium used variously as a chapel, theatre and recreation area. The jail is comprised of five tiers, with the rotunda opening onto the second tier. The first tier, referred to as the flats, is used as a dining area in addition to containing cells. The cell blocks extend from floor to ceiling with a catwalk providing access to each tier and, along the sides of the cell blocks, to each cell. The acoustics are poor and noises made anywhere in the jail are heard constantly throughout the jail.[103] Female inmates were housed in a separate annex consisting of one cell block, with four tiers on each side and ten cells to a tier. However, in 1974 the female inmates were transferred from the Charles Street Jail under a court order designed to reduce the inmate population.[104] In 1973 only 142 out of 180 cells for men were

[100] Brief of Inmates of Suffolk County Jail as Appellants in 77-1361 and Appellees in 77-1362 and 77-1363 at 4, Inmates of the Suffolk County Jail v. Kearney (1st Cir.).

[101] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).

[102] Letter to Visitors to the Charles Street Jail from Dennis J. Kearney, Sheriff of Suffolk County, at 2.

[103] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 679-80 (D. Mass. 1973).

[104] This order is referred to on appeal: Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), *cert. denied sub nom.* 419 U.S. 977 (1974). See also text at note 128-129, *supra.* Since the female inmates were transferred, the annex now houses mostly young male first offenders whom the jail administrators feel are benefited by being

operable; the others, due to various defects, were not usable.[105]

According to the findings of the district court which were facilitated, in part, by observations which Judge Garrity made during a night he and his law clerk spent in a cell in the jail,[106] the cells are approximately eight feet wide by eleven feet long by ten feet high.[107] Although constructed for single occupancy, in 1973 each cell housed two inmates. Furnishings included two cots, a toilet, a metal slab built into the wall for writing or storage, a sink with only cold running water, a few wall pegs and one sixty-watt light bulb. Since the cells were cramped, double cell occupancy led to constant physical contact and resulting tension between occupants. The cells are heated by means of blowers at the end of each tier; thus, the upper tiers are extremely hot in the summer and the lower tiers are frigid in the winter. The plumbing system is similarly antiquated and frequently floods; the toilets and sinks are corroded and present a serious health hazard.[108] Moreover, the jail is a fire hazard partially because, in the event of a fire, the cells must be individually unlocked and there is but a single fire ladder which is located in the east wing.[109] In addition, roaches, rats, mosquitoes and waterbugs are a constant problem.[110]

The plaintiffs alleged that the totality of conditions in the jail[111] violated their rights under the cruel and unusual punishment provi-

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segregated from the repeat offenders. Conversation with Mr. Tom Downey; Community Affairs Officer, Suffolk County Sheriff's Office (March 15, 1979 at the Charles Street Jail).

[105] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 679 (D. Mass. 1973).

[106] *Id.* at 680-81 n.5, 8.

[107] *Id.* at 679.

[108] *Id.* at 679-80.

[109] *Id.* at 680. In addition there is no back-up electrical generator; thus, the effect of any fire or catastrophe in the jail could be compounded by lack of electrical power. *Id.*

[110] *Id.* The court's fact finding methods included interviews with the inmates, review of reports by expert commissions condemning the Charles Street Jail, and the use of expert testimony. In addition, Judge Garrity and his law clerk spent a night in a cell in the jail. *Id.* at 680-81 n.5, 8. These fact finding techniques are used in most prison and jail cases, although usually the judge merely tours the facility. It should be noted that the additional effort expended by Judge Garrity during the fact finding stage was indicative of his extreme concern with the issues involved in this litigation. This concern was manifested in many of his actions throughout the course of the Charles Street Jail litigation.

[111] *See generally* Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform,* 12 HARV. C.R.-C.L. L. REV. 367, 372-76 (1977). "Under the totality of conditions approach . . . courts have held that prison conditions and practices which might not be unconstitutional if viewed individually can, when viewed as a whole, make confinement a cruel and unusual punishment." *Id.* at 372. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971) (the first case taking this approach).

sion of the Eighth Amendment[112] and the Due Process Clause of the Fourteenth Amendment.[113] It is important to note that the vast majority of the Charles Street Jail inmates are pretrial detainees,[114] and are in jail either because they did not post bail or because they are accused of a nonbondable offense. Therefore, they enjoy a presumption of innocence, as distinguished from those prisoners who have already been convicted of a crime and are serving their sentences.[115]

Suits concerning the housing conditions of state pretrial detainees are generally decided under the Due Process Clause of the Fourteenth Amendment, while suits concerning such conditions for sentenced prisoners are reviewed under the cruel and unusual punishment provision of the Eighth Amendment.[116] In *Inmates I*, after comparing the quality of incarceration at the Charles Street Jail with the quality of incarceration which the state designates as punishment for convicted inmates, the district court concluded that the conditions at the Charles Street Jail amounted to "punishment." Since "punitive measures are out of harmony with the Fourteenth Amendment to the Constitution, which forbids the deprivation of liberty without due process of law,"[117] such measures are justified only to the extent that they accomplish the state's purpose of securing the detainees' appearance at trial. The district court held that, because detention at the Charles Street Jail was not the least drastic means of achieving this purpose, the plaintiff-inmates were deprived of their substantive due process rights.[118]

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[112] U.S. CONST. Amend. VIII which provides: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted."

[113] U.S. CONST. Amend. XIV which provides: "[nor] shall any State deprive any person of life, liberty, or property, without due process of law. . . ." In addition, based on their position as detainees they alleged violations of the First Amendment (freedom of religion, speech, and press) and Sixth Amendment (jury trial for crimes, counsel, and other procedural rights) and sought increased access to counsel, visitors and reading material. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678-79 (D. Mass. 1973).

[114] *Id.* at 681.

[115] See note 2, *supra.*

[116] *See generally* Meyer, *Constitutionality of Pretrial Detention (Part II)*, 60 GEO. L. J. 1382 (1972); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941 (1970).

[117] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 685 (D. Mass. 1973).

[118] *Id.* at 685-86. The Due Process Clause of the Fourteenth Amendment imposes requirements of both substance and procedure. The substantive due process doctrine protects individuals from the government's unreasonable exercise of its police powers to deprive a citizen of life, liberty, or property. B. SCHWARTZ, CONSTITUTIONAL LAW - A TEXTBOOK, 165-66 (1972).

B. The Remedy Stage

1. Inmates I—The Initial Decree

Based on its finding that the conditions of confinement at the Charles Street Jail violated the plaintiff-inmates' due process rights, the district court ordered specific remedies. Most significantly, the court enjoined the defendants—the Sheriff of Suffolk County,[119] the master of the jail,[120] the Massachusetts Commissioner of Correction,[121] and the Mayor and nine City Councillors of the City of Boston[122]—from housing any pretrial detainee in the Charles Street Jail after June 30, 1976.[123] This order was based on the court's finding that the physical limitations of the jail made it impossible to remedy all the constitutional violations within that facility.[124] In order to ease the conditions of confinement during the interim period, the court ordered the defendants to make specific improvements. For example, the defendants were ordered to insti-

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In a recent decision the Supreme Court established a restrictive standard of review for evaluating whether particular conditions of confinement imposed on pretrial detainees violated the Due Process Clause. Bell v. Wolfish (May 16, 1979), 25 Crim. L. Rep. 3053 (1979). First, the Court held that under the Due Process Clause a pretrial detainee may not be punished. Thus, in evaluating conditions of confinement the test is whether those conditions amount to punishment. A showing of an intent to punish will suffice to prove punishment. However, if no such intent is shown a condition will not be deemed punishment if it is reasonably related to a legitimate, nonpunitive, governmental objective. The Court discussed two legitimate governmental objectives—securing the detainee's appearance at trial and effective management of the detention facility. *Id.*

[119] The Sheriff of Suffolk County has primary custody and control over the jail. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678 (D. Mass. 1973).

[120] The master of the jail has ongoing responsibility for its daily operation. *Id.*

[121] The Commissioner of Correction was the sole state defendant and is responsible for the supervision of the State correctional facilities. *Id. See also* MASS. GEN. LAWS ANN. ch. 124 § 1 (1974).

[122] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678 (D. Mass. 1973). Under MASS. GEN. LAWS ANN. ch. 34 § 4 (1958), the Mayor of the City of Boston and the Boston City Councillors are also Suffolk County Commissioners. In their capacity as Suffolk County Commissioners, these parties have a variety of responsibilities concerning the Charles Street Jail:

1. They are responsible for the expense of keeping and maintaining inmates. *Id.* ch. 126 §§ 29, 30, 33 (1974);
2. They are responsible for regular and emergency repairs and improvements to the jail. *Id.* ch. 34 § 14;
3. In general they have "authority to represent their county, and to have the care of its property and the management of its business and affairs. . . ." *Id.*;
4. They are responsible for the County's duty to provide a suitable jail. *Id.* at § 3.; Bartlett v. Willis, 3 Mass. 85, 102 (1807); Hawkes v. Inhabitants of County of Kennebeck, 7 Mass. 461 (1811).

[123] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 691 (D. Mass. 1973).

[124] *Id.* at 686-87.

tute single cell occupancy by November 30, 1973.[125] The court based this remedy on its finding that double-cell occupancy contributed to the overall unconstitutionality of the jail and that single-cell occupancy could be accomplished within the physical limitations of the jail.[126]

Inmates I was not appealed, reflecting an absence of overt resistance to the decision on the part of the defendants.[127] However, in 1974 the Commissioner of Correction did appeal from an ancillary decree directed at compliance with the single-cell occupancy order, requiring transfer of all female detainees and all male detainees with state felony records from the Charles Street Jail.[128] The Court of Appeals for the First Circuit held that failure to appeal the original judgment created a jurisdictional bar to consideration of its merits on a later appeal.[129] Therefore, the conclusions of law of *Inmates I,* regarding the existence of constitutional violations, remain unchallenged.

a. Limitations of the Initial Decree

Although the court recognized "that constitutional requirements cannot be satisfied without construction of a new jail,"[130] and that "the central effect of [its] order [was] the elimination and replacement of the present facility,"[131] Judge Garrity merely ordered the closing of the Charles Street Jail. This order was based on the twin principles of federal court deference to local control of institutions and federalism.[132] The closing order was not mandated under the nature of the violation limitation from *Swann.*[133] It might be argued that since the nature of the violation was the condition of the Charles Street Jail the court merely had the power to order a remedy related to that facility — either the reform or the closing of that jail. However, this argument is apparently incorrect. In fact,

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[125] *Id.* at 691.

[126] *Id.* at 690. See text and note at note 162, *infra.*

[127] M. HARRIS & D. SPILLER, JR., *supra* note 8, at 13.

[128] This order was referred to on appeal: Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), *cert. denied sub nom.* 419 U.S. 977 (1974).

[129] *Id.* at 1199-1200.

[130] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686-87 (D. Mass. 1973).

[131] *Id.* at 689.

[132] See text at notes 36-52, *supra.*

[133] Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1 (1971). See also text at notes 65-86, *supra.*

during the course of the remedy stage the court, in order to insure that the plaintiffs were provided with a constitutional remedy, was able to review and rule on the constitutionality of plans for a new jail which involved use of other facilities.[134] Moreover, it is obvious from the court's closing order that it envisioned an ultimate remedy outside the confines of the Charles Street Jail. Therefore, it must be concluded that in ordering the closing of the Charles Street Jail the court's sole constraint was that of deference to local control of the jail.

The court's closing order in *Inmates I* was the least intrusive order possible given the court's finding that the conditions within the Charles Street Jail could not be reformed. However, in a jail setting, closing the offending facility is not a viable remedy because it does not accomplish the legitimate state purpose of securing the detainees' appearance at trial, while its consequence, the release of the inmates, clearly threatens the public safety. Therefore, the indirect result of the court's order required the responsible local officials to propose and approve a plan for a new permanent jail meeting constitutional standards. By providing a three year grace period before closing the jail, Judge Garrity balanced the inmates' interests in their due process rights against the defendants' interests in control of the institution. However, in order to monitor and aid the defendants' efforts at providing a new facility and to affect a quick resolution of any subsequent dispute, the court retained jurisdiction and ordered the parties to submit periodic compliance reports.[135] Retention of jurisdiction is consistently used in institution reform cases since it reduces procedural obstacles during the implementation process by enabling the parties to make motions to amend, modify or enforce existing court orders without filing a new action.[136]

Inmates I was one of the ground breaking jail reform cases; as such it has some of the problems characteristic of innovative litigation. While the court must be applauded for its progressiveness, the Charles Street Jail litigation suffered because the parties and the court were unable to benefit from the vast body of literature concerning public law litigation which has since developed. If Judge

[134] See text at notes 129-221, *infra*.

[135] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 691 (D. Mass. 1973).

[136] M. HARRIS & D. SPILLER, JR., *supra* note 8, at 17. In addition, retention of jurisdiction may have a symbolic effect as a reminder to the defendants of their compliance responsibilities. *Id. See also* Special Project, *supra* note 3, at 816-17.

Garrity had had the benefit of the subsequently developed public law litigation model, numerous law review articles elaborating upon that model and subsequently decided cases, he might have chosen an alternative remedial combination at the decree formulation stage. Hindsight has shown that the court's remedial combination of closing order, retention of jurisdiction and periodic compliance reports was insufficient in aiding the defendants' efforts at providing a new jail. Under this remedial combination the court became a virtual bystander waiting for the defendants to propose a plan for court approval. In fact, the defendants did not propose their first plan until 1975.[137] The public law litigation model indicates that alternative remedial combinations might have better facilitated the defendants' compliance efforts, with minimal additional intrusion into local control of the jail.

b. Alternatives at the Decree Formulation Stage

Under the public law litigation model, a variety of alternatives are available to the judge at the decree formulation stage which will expedite the remedy stage by facilitating implementation of the decree by the parties. While considerations of federalism mandate an open-ended decree, the remedies in both *Brown II*[138] and *Inmates I* were unnecessarily vague. The implementation process following *Brown II,* for example, might have been expedited if that remedy had included specific desegregation techniques which met court approval. School boards attempting to desegregate their schools could thus have chosen the specific technique which best met their needs from among those offered by the Court. Similarly, although the Charles Street Jail litigation was based on a constitutional standard which any replacement jail had to meet, the court could have facilitated implementation of its decree by providing more specific standards to be met in a new pretrial detention facility,[139] as well

[137] See text at notes 164-187, *infra.*

[138] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[139] *See generally* Note, *supra* note 3, at 437-39. While there were few sources in 1973 from which the court could have gleaned minimum standards, Massachusetts law now provides standards for pretrial detention facilities. *See* DEPARTMENT OF CORRECTIONS, COMMONWEALTH OF MASSACHUSETTS, TENTATIVE DRAFT, STANDARDS FOR COUNTY CORRECTIONAL FACILITIES (1978). These standards were incorporated into the Suffolk County Detention Center, Charles Street Facility, Architectural Program dated January 1, 1979 according to which the parties agreed to design and build a new facility. Consent Decree, Inmates of the Suffolk County Jail v. Kearney, No. 71-162-G (D. Mass. May 7, 1979). See note 11, *supra.*

Courts in institution reform cases generally apply professional minimum standards rather

as possible locations and funding alternatives for that facility. Two avenues were available to the court to facilitate development of these specifications.

First, the court could have sought input from parties to the litigation. This mechanism would have both mitigated the inherent intrusiveness of a judicially imposed remedy and provided the court with the benefit of the parties' expertise in the area of jail administration and maintenance.[140] Since input from the parties usually promotes desirable results, the court should have required the defendants and plaintiffs to submit suggestions to the court.[141] Moreover, the court could have channelled the parties' involvement by providing guidelines as to the scope and form of these suggestions.[142] If input from the parties had been utilized at the decree formulation stage of the Charles Street Jail litigation the political and budgetary factors which influenced the defendants' compliance in later stages of the litigation[143] might have surfaced earlier. Consequently, the court could have taken some of these factors into consideration in delineating standards and plans, and could have warned the parties at the outset of those factors which it deemed insignificant. Furthermore, if Judge Garrity had sought input from the parties they might have been estopped at later stages of the litigation from disputing

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than ideal standards. Note, *supra* note 3, at 438. In Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), 448 F. Supp. 659 (D.R.I. 1978) (contempt order), the court measured the conditions at the Rhode Island Adult Correctional Institutions against "minimum standards." While the court noted that variance from these standards did not alone constitute a constitutional violation, variance was considered in determining the existence of constitutional violations. *Id.* at 979-80 n.30. Moreover, the court specifically incorporated these "minimum standards" into its decree. In constructing the "minimum standards" the court considered standards published by professional bodies, leading cases and expert testimony from the trial. *Id.* at 990-94.

[140] Note, *supra* note 3, at 439-40; Chayes, *supra* note 3, at 1298-1300; Special Project, *supra* note 3, at 800-01. It should be noted that the court would not be bound to accept these suggestions. Rather, it could choose among them, combine them, or impose a combination of the suggestions and court-devised plans and standards. *Id.* at 802.

[141] While considerations of deference to local control of institutions and federalism compel the court to seek input from the defendants in the course of the remedy stage, court-required input from the plaintiffs is more unusual. Federal district courts sought involvement from the plaintiffs in the following cases: Detainees of Brooklyn House of Detention for Men v. Malcom, 421 F. Supp. 832 (E.D.N.Y. 1976); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974), *cited in* Special Project, *supra* note 3, at 802-04.

[142] Costello v. Wainwright, 397 F. Supp. 20, 34-35 (M.D. Fla. 1975), *vacated and remanded en banc*, 539 F.2d 547 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 325 (1977); Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971), *cited in* Special Project, *supra* note 3, at 798.

[143] See text at notes 217-22, *infra*.

a plan which they suggested or which they participated in devising.

Second, the court might have sought input from parties outside of the litigation.[144] For example, a special master could have been appointed to assist the court in formulating the specifications of the decree.[145] Rule 53 of the Federal Rules of Civil Procedure empowers a federal district court judge to appoint a special master with authority to take all action necessary to fulfill his assigned tasks.[146] While the court must accept the master's findings of fact unless they are clearly erroneous,[147] it can modify or reject any of his recommendations.[148] However, in a non-jury case a district court's power to appoint a special master is limited to those situations involving exceptional conditions.[149] In the Charles Street Jail litigation, the closing order or the need for development of a plan for an alternate facility and minimum standards might have constituted a sufficiently exceptional situation.[150] If the court had appointed a special master at the outset, he could have supervised out-of-court negotia-

[144] The court could have sought aid from *amici curiae,* experts, panels, advisory committees, professional bodies, monitors, administrators, ombudsmen and masters. Special Project, *supra* note 3, at 804; Chayes, *supra* note 3, at 1300-02; Note, *supra* note 3, at 440. Furthermore, once the decree is established, use of parties outside the litigation can be repeated during the implementation and enforcement stages of the litigation. Chayes, *supra* note 3, at 1301. See note 223, *supra,* and text at notes 179, 279-93, *supra.*

[145] Special Project, *supra* note 3, at 805-09. *See generally* Note, *supra* note 3, at 451-52; Kaufman, *Masters In The Federal Courts: Rule 53,* 58 COLUM. L. REV. 452 (1958); Harris, *The Title VII Administrator: A Case Study In Judicial Flexibility,* 60 CORNELL L. REV. 53, 56 (1974); 5A MOORE'S FEDERAL PRACTICE ¶ 53.05(2), 2946-62 (2d ed. 1979); Note, *Monitors: A New Equitable Remedy?,* 70 YALE L.J. 103, 114-15 (1960).

[146] The court should specify the master's duties in its order of reference and appointment. Special Project, *supra* note 3, at 806. Judge Garrity appointed a special master at a later stage of this litigation, and accordingly specified his duties. Order of Reference and Appointment of Master at 2, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. October 6, 1976).

[147] FED. R. CIV. P. 53(e)(2).

[148] Special Project, *supra* note 3, at 806.

[149] Under the exceptional conditions requirement a court cannot appoint a special master prior to finding a violation. *Id.* at 807.

[150] In Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), the court, in its initial opinion, appointed a special master to monitor the defendants' implementation of the initial decree. The court cited "the complex nature of the task at hand, and the demands on the court's time and attention which would be entailed by direct court supervision of the remedial order," *id.* at 986, as its justification for the appointment. Although involving a special master in decree formulation would entail appointment prior to the initial opinion, justification in the Charles Street Jail litigation certainly equalled that cited in *Palmigiano.* Moreover, it should be noted that *Palmigiano* involved both a closing order and use of minimum standards. For a discussion of limitations on the appointment of masters in non-jury cases, *see* Kaufman, *Masters In the Federal Court: Rule 53,* 58 COLUM. L. REV. 452, 455-59 (1958).

tion between the parties geared toward providing the court with standards and alternative plans which were acceptable to all the parties.[151] Moreover, the special master could have conducted hearings and compiled minimum standards, and alternative plans for construction of a new pretrial detention facility which the court could have incorporated into the decree.

2. Inmates II—The Bail Appeals Project

In 1975 the district court ordered the city defendants[152] to assume funding for a "Bail Appeals Project"[153] under which federal funds were apportioned by a state agency to provide bail for some of the inmates at the Charles Street Jail. The state agency responsible for apportioning these funds had discontinued funding for the project, and the city-defendants had decided to terminate the project rather than provide city funds for its continuance.[154] Since the "Bail Appeals Project" facilitated compliance with the single cell occupancy order of *Inmates I,* the Court of Appeals for the First Circuit sought to avoid frustration of *Inmates I* by affirming the district court's continued funding order.[155] The First Circuit exhibited some concern over the possibility of excessive intrusion into matters of local control by discussing possible alternatives to the district court's order.[156] However, the court of appeals concluded that the differences in cost between the lower court's order and the available alternatives were minimal, and therefore held that the order did not constitute an abuse of discretion.[157]

Inmates II represents the only time in the course of the Charles Street Jail litigation that the court of appeals affirmed a district court funding order issued without prior approval by the defendant officials responsible for appropriating city funds.[158] Although the

[151] Special Project, *supra* note 3, at 809-12.

[152] The Mayor and the nine City Councillors of Boston will be referred to as the city defendants.

[153] This order was made after an informal hearing in the district court and is referred to on appeal. Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241, 1242 (1st Cir. 1975).

[154] *Id.*

[155] *Id.* at 1243-44.

[156] *Id.* The possible alternatives discussed by the court were: (1) joining the state agency responsible for apportioning the federal funds as a defendant and ordering it to continue funding; (2) ordering transfer of some of the federal prisoners housed in the Charles Street Jail to other institutions; or (3) using the Comprehensive Employment and Training Act to provide funds for continuation of the Bail Appeals Project. *Id.*

[157] *Id.* at 1244.

[158] CITY OF BOSTON CODE St. 6 §§ 251, 253 (1975) provides that City Council approval is

First Circuit did not extensively discuss the scope of the district court's equitable powers, it did find that a "clear and convincing showing of necessity"[159] was not a prerequisite to their use; its affirmance of the funding order implied that the district court's invocation of equity powers was proper.[160]

The court of appeals' action seems appropriate. Double celling in the Charles Street Jail was within the scope of the violation, so that the district court's single celling order aimed at correcting that violation was a proper remedy. Moreover, although there are considerable advantages to party participation in decree formulation,[161] unilateral judicial action is not excessively intrusive when aimed at relieving the plaintiffs from an oppressive condition pending broader relief.[162] Therefore, since the city-defendants' decision to terminate funds for the Bail Appeals Project threatened to frustrate the single celling order, the order to continue its funding certainly fell within the court's enforcement power.[163]

3. Inmates III—The Deer Island Plan

During the spring and summer of 1975, the city defendants proposed a plan for the renovation and modernization of the Hill Prison on Deer Island, a peninsula in Boston Harbor. The plaintiffs and the

necessary for capital expenditures by the City of Boston, whether in the form of appropriations orders or loan orders. The City Council can alter the amount of a loan, reject any item of a loan order, or alter the disposition of the proceeds by a two-thirds vote of the councillors at two readings. CITY OF BOSTON CODE St. § 15 (1975) provides that the Mayor can veto a loan order. A two-thirds vote of the City Council, however, will override this veto. The Boston City Councillors Memorandum of Law Concerning Responsibility for the Selection of a Jail Site at 4; Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass.)

[159] Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241, 1242 (1st Cir. 1975).

[160] The court of appeals cited two cases which hold that a federal court may enjoin state officials "upon a strong showing of necessity." Fox v. City of West Palm Beach, 383 F.2d 189, 194 (5th Cir. 1967); Alabama Pub. Service Comm'n v. S. Ry. Co., 341 U.S. 341, 349-50 (1951).

[161] See text at note 140, *supra.*

[162] Special Project, *supra* note 3, at 801. However, unilateral judicial action aimed at immediately relieving oppressive conditions leaves the defendants to grapple with the administrative problems resulting from the order. *Inmates II* exemplifies the Charles Street Jail defendants' attempt to resolve some of these problems. *See also* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978).

[163] For a comprehensive treatment of the position that federal district courts do not have the power to order increased local expenditures in institution reform cases, with a mention of the Bail Appeals Project order as an example of excessive action, *see* Frug, *supra* note 95, at 724.

county defendants[164] opposed this plan.[165] However, on October 20, 1975, the district court accepted the plan and ordered its implementation.[166] This order included a provision that "[t]he defendants shall *take such steps and expend such sums of money as are necessary* to completely renovate and modernize the Hill Prison at Deer Island . . . in accordance with plans submitted to the court."[167] To facilitate implementation of the Deer Island Plan, the district court extended the deadline for closing the Charles Street Jail to July 1, 1977.[168] Both the plaintiffs and the defendant Sheriff of Suffolk County appealed the Deer Island Plan.[169]

The Mayor then submitted for the approval of the City Council[170] a proposed order for the appropriation of $8,500,000 to implement the Deer Island Plan.[171] The City Council believed that it would be irresponsible to approve the Mayor's appropriations order on the basis of the minimal information they were given concerning the plan,[172] and therefore rejected the order by a vote of six to two, with one councillor abstaining.[173] The district court responded to this vote with an order to the City Councillors to show cause why they should not be held in contempt of court;[174] the City Councillors opposed the show cause order. However, when the Commissioner of Correction withdrew his support of the plan[175] because the Deer Island site had been preempted for use as a secondary sewage treatment plant,[176] the contempt order was mooted and the order for

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[164] The Sheriff of Suffolk County and the master of the Charles Street Jail will be referred to as the county defendants.

[165] Brief of Inmates on Appeal, *supra* note 100, at 7.

[166] Memorandum and Order Modifying Decree Dated June 20, 1973, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. October 20, 1975).

[167] *Id.* at 4 (emphasis added).

[168] *Id.*

[169] Brief of Inmates on Appeal, *supra* note 100, at 7.

[170] See note 125, *supra.*

[171] Order to Show Cause at 1, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. May 26, 1976).

[172] Brief for Defendant City Councillors at 5, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass).

[173] Order to Show Cause of May 26, 1976, *supra* note 171, at 2.

[174] *Id.* at 3-4. For a discussion of the contempt sanction as an enforcement device see text at notes 271-79, *supra.*

[175] MASS. GEN. LAWS. ch. 34 § 14 (1958) provides that the Commissioner of Correction must approve any plan for construction of a jail.

[176] Memorandum of Decision Regarding July 28, 1976 Order and Confirmatory Orders at 2, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. October 6, 1976).

implementation of the Deer Island Plan was vacated.[177] Significantly, the court held that its order to close the Charles Street Jail by July 1, 1977 remained in effect.[178] In addition, the district court appointed a special master to oversee the defendants' efforts to devise a plan for a replacement facility.[179]

In opposing the show cause order, the City Councillors argued that by directly ordering the Council to expend monies, the court had gone beyond the relief usually granted in prison and jail reform cases.[180] This argument takes issue primarily with the form of the court's order since the practical effect of the funding order was the same as the effect of the closing order in *Inmates I.* As the court in *Inmates I* noted, "without question, the [closing order] will impose an economic burden upon the taxpayers of Suffolk County, [however] a deprivation of constitutional rights may not be justified upon economic considerations."[181] In fact, courts in prison and jail reform cases have consistently held that a lack of funds provides no excuse for noncompliance with court orders.[182] For example, the Federal District Court for the Eastern District of Arkansas has forcefully stated that:

> the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may

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[177] *Id.* at 1.

[178] *Id.* at 4.

[179] For a discussion of the use of special masters at the decree formulation stage, see text and notes at 145-52, *supra.*

[180] Brief for Defendant City Councillors, Deer Island Plan, *supra* note 172, at 8-11. The defendants argued that typically courts in prison and jail cases have ordered the responsible executive officials, and not the legislative officials, to propose plans to remedy constitutional violations. Moreover, when those executive officials do not implement these plans courts have imposed sanctions on them.

[181] Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 687 (D. Mass. 1973).

[182] Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978); Costello v. Wainwright, 525 F.2d 1239, 1252 (5th Cir. 1976); Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 201 (8th Cir. 1974), *on remand,* 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd,* 548 F.2d 740 (8th Cir. 1977), *cert. granted,* 434 U.S. 901 (1977); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974); Barnes v. Government of V.I., 415 F. Supp. 1218, 1227 (D.V.I. 1976); Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 595 (D.P.R. 1976); Morales v. Turman, 383 F. Supp. 53, 59 (E.D. Tex. 1974); Rhem v. Malcom, 377 F. Supp. 995, 999 (S.D.N.Y. 1974), *aff'd and remanded,* 507 F.2d 333 (2d Cir. 1974), *judgment entered,* 389 F. Supp. 964 (S.D.N.Y. 1975), *modified,* 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd per curiam,* 527 F.2d 1041 (2d Cir. 1975). 432 F. Supp. 769 (S.D.N.Y. 1977) (denying motion to reopen institution); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).

> actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.[183]

Support for the district court's funding order is found in *Griffin v. County School Board of Prince Edward County,*[184] where the Supreme Court held that the district court had the power to order local officials to levy taxes in order to effect desegregation.[185] Since a funding order is an enforcement mechanism — an intrusive, formal action employed by a court in order to force the defendants' compliance[186] — its use must be based on a finding that the defendants were not making a good faith effort at complying with the initial decree. Therefore, in *Inmates III* the City Council should have argued solely that the paucity of available information concerning the Deer Island Plan evidenced the exercised of their good faith and best judgment in rejecting the appropriations.

4. Inmates IV—City Prison and Middlesex County Jail as Interim Facilities

On June 30, 1977, the district court ordered that the City Prison, a facility located in the basement of the Suffolk County Courthouse in Boston, be renovated by November 1, 1977 in order to act as an interim facility for confinement of detainees.[187] On that date the

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[183] Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970).

[184] 377 U.S. 218 (1964).

[185] See text at notes 59-61, *supra.* The holding to "levy taxes" in *Griffin* has been cited as authority for extensive equitable relief in the following cases: J.L. v. Parham, 412 F. Supp. 112, 140 (M.D. Ga. 1976) (holding that a statute which provides for voluntary admission of minor children to mental hospital by parents or guardian violates due process; remedy included order that defendants spend such money of State of Georgia as is necessary to provide non-hospital facilities and to place the children in such facilities); Bradley v. Milliken, 540 F.2d 229, 244 (6th Cir. 1976) (holding that state must pay certain percentage of costs for desegregation plan); Morgan v. McDonough, 548 F.2d 28, 31 (1st Cir. 1977) (holding that district court acted properly in directing school committee to vote to hire certain administrators for school placed in receivership, because in extreme circumstances the equity power of the federal court extends to orders controlling actions of elected officials in the exercise of their duties). *See generally* Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy,* 59 GEO. L. REV. 393 (1970).

[186] See text and note at note 94, *supra.*

[187] Memorandum and Orders Regarding Renovation of City Prison Facility and Closing of Charles Street Jail, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. June 30, 1977). This order was based, with slight modifications, on a November 2, 1976 report entitled Masters Report of Use of City Prison Facility. This was one of three reports filed by the special master as a result of extensive hearings which he held between October 1976 and March 1977. Brief of Inmates on Appeal, *supra* note 100, at 9. The two other reports filed

Charles Street Jail was to be closed to incoming detainees.[188] In addition, the court ordered the Mayor to submit, for the City Councillors' approval, appropriation orders sufficient to accomplish the renovation and staffing of City Prison.[189] Moreover, the district court ordered the City Councillors to *"take such steps and expend such sums* as are reasonable and necessary to complete the repairs and renovations . . . which have been found to be necessary to the proposed use of the city prison facility."[190]

All of the parties appealed the City Prison order.[191] While agreeing that the district court had the authority to make such an order when the alternative facility meets constitutional standards, the plaintiffs argued that City Prison did not meet those constitutional standards and that the district court had therefore exceeded the bounds of its authority.[192] The Boston City Councillors requested a stay of both the City Prison order and the November 1, 1977 closing date, arguing that the funding order was improper because it exceeded the nature of the violation.[193] Moreover, the City Councillors argued that the court's utilization of its equity powers in issuing the City Prison order usurped legislative authority over funding as guaranteed under both the Tenth Amendment[194] and principles of federalism.[195]

In September 1977, the Court of Appeals for the First Circuit denied defendants' request for a stay of the closing date,[196] finding that the substantive issues of this case had already been decided in *Inmates I.*[197] However, with respect to the equity arguments, the

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are: Masters Report Concerning Establishment of a Suffolk County Pretrial Detention Facility to Replace the Charles Street Jail, March 29, 1977; Masters Report on Closing of the Charles Street Jail, April 21, 1977. Memorandum and Order of June 30, 1977, *supra* note 187, at 1.

[188] *Id.* at 5. This district court order was issued contrary to the suggestion of the master that the Charles Street Jail remain open until a new permanent facility was contructed.

[189] *Id.* at 4.

[190] *Id.* (emphasis added).

[191] Brief of the Appellant Boston City Councillors at 4, Eisenstadt v. Inmates of the Suffolk County Jail, Nos. 77-1361, 77-1362, 77-1363 (1st Cir.).

[192] Brief of Inmates on Appeal, *supra* note 100, at 29-31.

[193] Brief of Appellant Boston City Councillors, City Prison, *supra* note 191, at 4-8.

[194] U.S. CONST., Amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[195] Brief of Appellant City Councillors, City Prison, *supra* note 191, at 8-15.

[196] Memorandum and Order at 2, Eisenstadt v. Inmates of Suffolk County Jail, Nos. 77-1361, 77-1362, 77-1363 (1st Cir. Sept. 2, 1977).

[197] *Id.*; see also text at notes 116-26, *supra.*

First Circuit was less definite. Based on the premise that the responsible executive officials optimally should make decisions concerning a replacement facility, the court granted the stay of that part of the district court's order requiring renovation of City Prison.[198] In order to facilitate this preferred resolution of the issue, the court of appeals suggested that Judge Garrity provide general guidelines for the standards to be met in a new facility.[199]

Following the court of appeals' stay of the City Prison order,[200] the Mayor and the Sheriff of Suffolk County began negotiations with Middlesex County officials for use of the nearby Middlesex County Jail.[201] After holding a hearing, the special master filed a report recommending the use of the Middlesex County Jail as an interim facility, subject to certain alterations, to house not more than 123 pretrial detainees at any one time.[202] On October 25, 1977, the district court adopted the master's findings, with certain modifications.[203]

Once again political disputes interfered with implementation of the district court's order, as the City Council failed to pass loan orders submitted by the Mayor for the funding of the court-adopted Middlesex County Jail plan.[204] Following a hearing, the district

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[198] *Id.* at 4.

[199] *Id.* Moreover, the court's decision was also based on the imminence of a determination of the issues on appeal. *Id.* The First Circuit's suggestion that Judge Garrity provide general guidelines reflects a recognition of the fact that the district court had the power to review the constitutionality of facilities other than the Charles Street Jail. Brief of Inmates on Appeal, *supra* note 100, at 24.

[200] *Id.*

[201] The Middlesex County Jail is located on the top floor of the Middlesex County Courthouse in East Cambridge, Massachusetts.

[202] Memorandum and Orders Regarding the Use of Middlesex County Jail and the Closing of Charles Street Jail at 1-2, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. Nov. 2, 1977). Plaintiffs opposed use of the Middlesex County Jail because the Cambridge fire chief felt it was a fire hazard, and because it did not conform to minimum standards of confinement for detainees. Brief of Inmates on Appeal, *supra* note 100, at 32-34. On September 30, 1977 the district court referred the matter of the Middlesex County Jail to the special master. This oral order was then confirmed by a written order of October 4, 1977. Memorandum and Orders, Nov. 2, 1977, *supra* note 202, at 1.

[203] *Id.* The modifications were that the glass barriers in the inmate visiting rooms be replaced by a heavy-duty screen rather than be removed altogether, and that a program of contact visits be established for the detainees. *Id.* at 2.

[204] On October 26, 1977 and October 31, 1977 the City Council voted down loan orders submitted by the Mayor for construction of a new permanent facility. On October 31, 1977 the City Council rejected the Mayor's request for $1,100,000 to renovate City Prison and for $2,000,000 to lease, staff and operate the Middlesex County Jail. Both of the Mayor's requests were dated October 28, 1977. *Id.* at 2.

court, on November 2, 1977, ordered that the Mayor, after conferring with the Sheriff, submit a request to the City Council for the appropriations necessary to allow use of Middlesex County Jail as an interim facility; the court also ordered the City Council to promptly approve the appropriations when submitted by the Mayor.[205] Furthermore, the court extended the November 1, 1977 closing deadline to a date five weeks after the City Council's approval of the appropriations.[206]

Plaintiffs appealed from both the October 25, 1977 and the November 2, 1977 orders, while the defendants appealed only from the November 2, 1977 order.[207] Possessing parallel issues, these appeals and the appeals from the district court's City Prison orders were consolidated.[208] In its decision, the court of appeals stayed until March 3, 1978 the district court's injunction which ordered the appropriation of the necessary renovation funds and required the closing of the Charles Street Jail five weeks after the City Council's approval of appropriations.[209] Once again, the First Circuit based this decision on its holding that the responsible executive officials ideally should decide on a new facility. Nonetheless, although finding that the possibility of the parties reaching an agreement without judicial intervention still existed,[210] the First Circuit did specify that such an agreement must include a commitment to provide adequate funds for both interim and long term facilities, as well as specifications concerning a new jail site and target dates for its construction.[211] However, that part of the court's holding concerning the extent of the district court's equity powers, should they be required to enforce its orders, remained ambiguous:

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[205] *Id.* at 4.

[206] *Id.* On October 28, 1977 Sheriff Kearney had filed a motion requesting that the Mayor and City Councillors be ordered immediately to provide funds for the Middlesex County Jail and that the November 1, 1977 closing date be extended to December 6, 1977 to give the Sheriff sufficient time to prepare for use of the Middlesex County Jail. *Id.* at 2.

[207] Brief of Inmates on Appeal, *supra* note 100, at 16.

[208] *Id.* at 16 n.52.

[209] Memorandum and Order, Inmates of the Suffolk County Jail v. Kearney, Nos. 77-1361, 77-1362, 77-1363 (1st Cir. Dec. 15, 1977). The First Circuit agreed to this stay because of the short time period involved. Oral argument was heard in December, 1977. Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978).

[210] Memorandum and Order, Dec. 15, 1979, *supra* note 209, at 1-2. The court based this finding on the following facts: a new City Council had come into office, a portion of the planning for a new jail had already been completed by the city and county, and federal legislation which would assist financing of a dual-purpose facility was pending. *Id.* at 2.

[211] *Id.* at 3.

> the parties should understand that whatever the status of affairs by March 3, this court does not envisage further or protracted delay in this matter. Failing the cooperation and assistance of the various parties in developing and implementing a solution to the problem of pretrial detainee incarceration, *this court will be left with no alternative but to authorize far-reaching action by the district court.*[212]

Finally, on March 17, 1978, the court of appeals, after noting that the parties were not closer to reaching an agreement, affirmed the district court's order prohibiting confinement of pretrial detainees at the Charles Street Jail.[213] This decision marked a turning point in the Charles Street Jail litigation. The First Circuit held that, unless the defendants proposed an acceptable plan for a new permanent facility at the Charles Street site[214] or at another site, including commitments to funding its construction and target dates for its completion, the Charles Street Jail would be closed on October 2, 1978.[215] The court postponed consideration of the district court's City Prison and Middlesex County Jail orders until the city defendants accepted a plan for a new permanent facility.[216] Moreover, rather than remanding to the district court for enforcement of its closing order, the First Circuit exercised its jurisdiction, and itself undertook to enforce the order. Closing the Charles Street Jail on October 2, 1978 thus became a reality which only the Mayor and City Council could avoid by agreeing to a plan for a replacement facility which met district court approval.

Inmates IV illustrates two important points. First, in molding a remedy which complied with the mandate of *Inmates I,* both the

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[212] *Id.* at 4 (emphasis added). The First Circuit was vague as to the propriety of the district court's funding order, probably because, given the poor conditions in City Prison (see text at note 192, *supra*), this was not a proper case for consideration of the merits of that question. Moreover, at this point in the litigation, the First Circuit had not determined that the defendants had ceased to exercise good faith; therefore, in its view, any enforcement mechanism was inappropriate. See text at notes 236-38, *infra.*

[213] Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 100 (1st Cir. 1978).

[214] *Id.* at 100-01. Until March 1, 1978, the City Council was deadlocked on selecting a site for a new pretrial detention center. Five votes were the most cast in favor of any one proposal and six votes were needed. Finally, on March 1, 1978, six councillors agreed to a $10,000,000 loan order for a pretrial detention center at the Charles Street site. This loan order passed the required second reading on March 22, 1978; however, it was then disapproved by the Mayor and therefore was no longer viable. Brief of Appellant Boston City Councillors on Appeal from Orders of the United States District Court for the District of Massachusetts Dated May 2, 1978 at 2, Inmates of Suffolk County Jail v. Kearney, No. 78-1216 (1st Cir.).

[215] Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 100-01 (1st Cir. 1978).

[216] *Id.* at 101.

district court and the First Circuit afforded great deference to the defendants' right to local control of their institutions, giving them many opportunities to comply with its order. However, throughout the litigation, and especially in *Inmates IV,* the cumulative effect of numerous political and budgetary factors militated against the defendants' willingness to comply with the district court's decree. During the first four years of the remedy stage, the opposition of many of the City Councillors to compliance with the court's order may have stemmed from the unpopularity of Judge Garrity resulting from his involvement in the Boston school desegregation case, as well as the political gains to be gotten by such public recalcitrance.[217] Moreover, no City Councillor wanted to vote for a site which would place the new jail in his own neighborhood.[218] Furthermore, some of the councillors wanted to solve the problems at the Deer Island House of Correction at the same time they were dealing with those at the Charles Street Jail; such a combined solution hopefully would have entitled the City to federal subsidies amounting to $15,000,000.[219] In addition, commercial developers were apparently interested in the Charles Street Jail site; sale of this valuable downtown property which borders an affluent residential area, overlooks the Charles River and is proximate to Boston's thriving downtown area, would have entitled the City to a substantial purchase price and additional monies resulting from increased tax revenues.[220] In general, elected officials may be reluctant to approve increased spending to remedy conditions in institutions which are not visible to the public and about which many voters are unconcerned.[221] Moreover, political realities make elected officials far more concerned with their constituents' views than with those of a

[217] *See* Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975), *enforced by,* 401 F. Supp. 216 (D. Mass. 1975), *aff'd,* 530 F.2d 401 (1st Cir. 1976), 530 F.2d 431 (1st Cir. 1976), *cert. denied,* 426 U.S. 935 (1976), *enforced by,* 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (appointment of receiver). *See generally* Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School,* 12 NEW ENG. L. REV. 55 (1976).

[218] Brief of Boston City Councillors dated May 2, 1978, Moyer Plan, *supra* note 214, at 6.

[219] *Id.*

[220] *Id.*

[221] On the other hand, opposing unpopular court orders can generate votes. For example, in the Boston school desegregation case, the public was strongly opposed to desegregation. The Boston School Committee found refusal to cooperate with the district court to be a popular political position. Goldstein, *supra* note 5, at 69-71 n.332.

politically disenfranchised group such as prisoners.[222]

Second, *Inmates IV* demonstrates that, once the lower federal courts determine that deference to local control of institutions has not effectuated the desired remedy, the courts must end their monitoring function[223] and enforce their decrees. The hearings which preceded the court's June 30, 1977 City Prison order demonstrate that, in Judge Garrity's view, the balance had shifted in favor of the plaintiffs' rights. The court expressed frustration at the blurring which had occurred between judicial, legislative and executive responsibilities.[224] The court also expressed as its primary concern the enforcement of its "constitutional mandate"[225] to close the Charles Street Jail as ordered in *Inmates I,* and alluded to the well-established principle that lack of funds is not a judicially recognized excuse for noncompliance with a remedial decree.[226] Judge Garrity explained:

> the city's obligation cannot, in my understanding of the law and of the responsibilities of all of us here, cannot be thought of in terms of contingencies. The moment the cost of complying with a constitutional mandate gets in its way, the responsibility of the Court becomes clear, and the Court cannot permit the parties in the case to think in terms of—about contingencies, the contingency of the federal funding. There is nothing contingent about the requirement under the laws of the Commonwealth of Massachusetts and there is nothing contingent about the requirements of the Fourteenth Amendment . . . .[227]

Since by June 30, 1977 the district court had determined that the defendants had ceased to exercise good faith, it attempted to enforce *Inmates I* by enjoining the defendants from admitting detainees to the Charles Street Jail after November 1, 1977. However, the court was concerned that " 'public safety necessitates provision of

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[222] Chayes notes that the fact that prisoners, inmates in mental institutions, and ghetto dwellers have no real access to the legislative process argues for increased judicial activism under the public law litigation model. Chayes, *supra* note 3, at 1315.

[223] Despite the numerous political and budgetary factors militating against compliance the court remained a monitor throughout *Inmates IV.* The court utilized retention of jurisdiction, compliance reports, and appointment of a special master as its monitoring mechanisms. See text at notes 135-36, and note 179, *supra.*

[224] Excerpt of Proceedings—After Recess at 11-16, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. May 10, 1977).

[225] *Id.* at 15.

[226] See text at notes 181-83, *supra.*

[227] Excerpt of Proceedings—After Recess at 15-16, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. May 10, 1977).

an assured replacement detention facility where persons committed after November 1, who are too dangerous for predisposition release, may be jailed' ";[228] therefore, the court attempted to provide an interim facility.[229] At this stage of the litigation, the City Councillors once again utilized the principles of federalism to argue that the district court had gone beyond the scope of its equitable powers. The City Councillors also argued that the court's order established a remedy beyond the nature of the violation as construed by the court in *Inmates I*.[230] The latter argument is not persuasive because practicality necessitates that the court have the power to look beyond the boundaries of the Charles Street Jail in order to insure a constitutional remedy for the plaintiffs. In fact, the First Circuit implicitly recognized this power when it suggested that the district court provide the defendants with general guidelines for a replacement facility.[231] Moreover, it is obvious from the court's closing order in *Inmates I* that subsequent remedial orders could not have been limited to the confines of the Charles Street Jail. In essence, both arguments advanced by the City Councillors seem to take issue with the intrusiveness of the district court's orders.[232] Although use of City Prison was not proposed by the parties,[233] the district court's

[228] Brief of Inmates on Appeal, *supra* note 100, at 11.

[229] Judge Garrity stated that his motivation in ordering use of City Prison as an interim facility was concern for the public safety. *Id.* However, Judge Garrity may also have, understandably, been reacting to city defendants who, as they had done in the Boston School desegregation case, refused to comply with court orders.

[230] Brief of Appellant Boston City Councillors, City Prison, *supra* note 191, at 4-8.

> The well-tailored remedy, consonant with limitations on the power of federal courts, *for unconstitutional conditions of confinement at the Charles Street Jail is either an improvement of conditions at the jail or closure.* The District Court's first opinion reflected a correct understanding of the limitations on the equitable powers of federal courts . . . .
>
> In contrast to the first orders entered in this case, the City Prison orders exceed the authority of federal courts to remedy the constitutional violations found at the Jail . . . . The City Prison orders to renovate and operate an entirely separate facility plainly are not a remedy for the unconstitutional confinement of plaintiffs at Charles Street. The remedy exceeds the scope of the violation.

Id. at 7.

[231] Memorandum on Orders of September 2, 1977 *supra* note 196, at 4. *See also* Brief of Inmates on Appeal, *supra* note 100, at 24.

[232] As to the City Council's argument that the court's orders violated the Tenth Amendment, in Milliken v. Bradley (Milliken II) the Supreme Court held that "[t]he Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal court judgment enforcing the express provisions of the Fourteenth Amendment." Brief of Inmates on Appeal, *supra* note 100, at 28 n.65, *Citing* Milliken v. Bradley, 433 U.S. 267, 291 (1977).

[233] Use of City Prison as a temporary facility was first proposed by Sheriff Eisenstadt in

orders seem to be a necessary intrusion in light of the court's four and a half year attempt to defer to local legislative and executive control. However, it should be noted that the court's unilateral imposition of a plan for use of City Prison might not have been necessary if the court had sought input from the parties at the decree formulation stage.[234]

Although the district court determined, prior to issuing the City Prison Order of June 30, 1977, that the defendants had failed to exercise good faith,[235] the Court of Appeals for the First Circuit did not at that time share this view. The First Circuit's decisions to stay the City Prison Order[236] and to stay the injunction against the use of the Charles Street Jail until March 3, 1978[237] evidence this fact. The appeals court based its view on the finding that, ideally, the local officials should make decisions concerning a new facility. However, in its decision of March 17, 1978 the court of appeals found a lack of good faith on the part of the defendants and decided to enforce the *Inmates I* mandate by closing the Charles Street Jail on October 2, 1978.[238]

5. Inmates V—The Moyer and City Plans for a Permanent Replacement Facility

On April 12, 1978, the City Council voted to adopt the Moyer Plan,[239] which called for reconstruction of the Charles Street Jail as a permanent facility.[240] The Council also passed at the first read-

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September, 1976. Next, in November, 1976, its use was proposed by the Special Master. Brief of Inmates on Appeal, *supra* note 100, at 11 n.28.

[234] See text at notes 140-44, *supra*.

[235] See text at notes 180-87, *supra*.

[236] See text and note at note 198, *supra*.

[237] See text and notes at notes 209-10, *supra*.

[238] A difference in the timing between the district court's and the court of appeals' determinations of when the defendants have ceased to exercise good faith is also evident in Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *supplemented*, 68 F.R.D. 589 (D. Minn. 1975), *aff'd*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). In 1974 the district court held that the conditions in Minnesota mental hospitals violated due process requirements. In 1976, the court enjoined the enforcement of a Minnesota constitutional provision and certain fiscal control statutes proscribing legislative and administrative procedures for appropriating and expending state funds. The injunction was intended to eliminate fiscal obstacles to implementation of the district court's first order. The Court of Appeals for the Eighth Circuit dissolved the district court's injunction, finding that the state legislature was entitled to an opportunity to appropriate the funds and remedy the unconstitutional facilities without court intervention. *Id.*

[239] Brief of Boston City Councillors dated May 2, 1978, Moyer Plan, *supra* note 214, at 2.

[240] The Boston City Councillors' Opposition to the Commissioner of Corrections' "Answer"

ing[241] a loan order of $12,000,000 to facilitate adoption of this plan.[242] On May 2, 1978, after a hearing concerning the Moyer Plan, the district court held that it would not review the plan until the City Council approved a loan order for $13,983,000 plus whatever additional sum they felt would be needed for incidental site work and professional fees.[243] The City Council immediately appealed this order,[244] and two weeks later failed to pass at the second reading the $12,000,000 loan order.[245] The City Council then passed a resolution stating that, if Judge Garrity approved the Moyer Plan as constitutionally sound and ordered it implemented and adequately funded, the Council would appropriate the necessary money amounting to at least $12,000,000. Moreover, the Council resolved not to appeal such an order provided it "does not specify an unreasonably large amount to be appropriated."[246] The Mayor opposed the Moyer Plan, instead preferring a plan for construction of a facility on Nashua Street in Boston to replace both the Charles Street Jail and the Deer Island House of Correction.[247]

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at 2 n.3, Inmates of Suffolk County Jail v. Kearney, No. 8075 (1st Cir.).

[241] See note 158, *supra*.

[242] Brief of Boston City Councillors dated May 2, 1978, Moyer Plan, *supra* note 178, at 2. This plan was orginally proposed by Fredric D. Moyer, an architect and then chairman of the National Clearing House for Criminal Justice. During the fall of 1976 the plan was presented to the special master who then decided it was superior to two other plans before him. *Id.* at 1.

[243] Memorandum and Procedural Orders at 2, Inmates of the Suffolk County Jail v. Eisenstadt, No. 71-162-G (D. Mass. May 2, 1978). Judge Garrity based this holding on the fact that the court of appeals would not consider a plan for a permanent facility unless it was coupled with a commitment to adequate funding. Since the cost estimate for the Moyer Plan was $14,000,000, and the City Council had only approved a $12,000,000 loan order, the district court concluded that the City Council must approve a loan order in the sum of $13,983,000 plus whatever was needed for incidental site work and professional fees in order to meet the First Circuit's approval. *Id.* at 1-2.

[244] Inmates of the Suffolk County Jail v. Kearney, slip op. at 2, No. 78-1216 (1st Cir. June 15, 1978).

[245] Brief of Boston City Councillors dated May 2, 1978, Moyer Plan, *supra* note 214, at 2.

[246] *Id.* at 3.

> Resolved that if the United States District Court approves the Moyer Plan as meeting constitutional standards, and if the District Court orders the Moyer Plan implemented and adequately funded, the Boston City Council will vote forthwith by at least the necessary six votes at its necessary two readings, to pass a loan order to be in an amount not less than $12,000,000. The Council will not appeal the order referred to above, provided the order does not specify an unreasonably large amount to be appropriated.

Id.

[247] Inmates of the Suffolk County Jail v. Kearney, slip op. at 3, No. 78-1216 (1st Cir. June 15, 1978); Boston Globe, September 29, 1978 at 14, col. 1. One could speculate that the Mayor preferred a Nashua Street plan because the Nashua Street site was not in a residential area

On June 15, 1978, the First Circuit affirmed the district court's May 2, 1978 decision to reserve consideration of the constitutionality of the Moyer Plan.[248] However, the court of appeals suggested that a review of the Moyer Plan by Judge Garrity might, by "clarifying the choice to be made by elected officials,"[249] facilitate a quick resolution to the problem of a permanent replacement facility. In a June 29, 1978 memorandum, the district court rejected this suggestion, suggesting that review at this stage would "enlist the court on one side of a political field where it should not tread."[250] Although the City Council appealed this memorandum, the First Circuit affirmed the district court, stating that "[i]n a good faith dispute between the executive and the legislature in which no provision of constitution or law is implicated, the court's role is limited."[251] Significantly, the court of appeals reasserted the October 2, 1978 closing date for the jail.[252]

On September 28, 1978, the city defendants filed the City Plan with the district court for approval.[253] The City Plan entailed "a written description of the conditions of confinement of pretrial detainees as permitted in the opinion of the Court of Appeals dated

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and therefore there was little chance of this plan alienating any of his constituents. Furthermore, problems had arisen concerning the conditions at the Deer Island House of Correction and the Mayor might have seen this as an opportunity to improve that situation.

[248] Inmates of the Suffolk County Jail v. Kearney, slip op. at 4, No. 78-1216 (1st Cir. June 15, 1978). The First Circuit based its decision on a finding that the parties held "sharply disparate positions." Moreover, the court noted that at the time of the district court's May 2 decision, the City Council had put a ceiling on its funding of the Moyer Plan and their voting process was only half completed, indicating merely a potential commitment to adequate funding. *Id.*

[249] *Id.* at 5, *cited in* Memorandum, Inmates of the Suffolk County Jail v. Kearney at 3, No. 71-162-G (D. Mass. June 29, 1978).

> We observe, without intending to tie the court's hands, that any long range plan advanced in good faith with facially reasonable claims to constitutional adequacy and assurance of implementation may with profit be judicially scrutinized. Whether the result be to identify a plan that will pass constitutional muster or to expose a plan as fatally defective, there will be a benefit in clarifying the choice to be made by elected officials.

Inmates of the Suffolk County Jail v. Kearney, slip op. at 5, No. 78-1216 (1st Cir. June 15, 1978).

[250] Memorandum dated June 29, 1978, *supra* note 249, at 3.

[251] Memorandum and Order at 2, Inmates of the Suffolk County Jail v. Kearney, No. 78-8075 (1st Cir. July 25, 1978).

[252] *Id.* at 3.

[253] Memorandum and Orders as to Pretrial Detention Center at 1, Inmates of the Suffolk County Jail v. Kearney, No. 71-162-G (D. Mass. Oct. 2, 1978). The City Plan was developed by Boston's Public Facilities Department. Boston Globe, September 29, 1978 at 14, col. 1.

March 17, 1978"[254] and called for the renovation and reconstruction of the Charles Street Jail to comply with these conditions.[255] Although the City Council also concurrently passed loan orders totalling $15,400,000 for implementation of this plan, the Mayor withheld his approval.[256] The following day, Judge Garrity announced that the Mayor's refusal to sign the loan order meant that the Charles Street Jail would be closed on October 2, 1978.[257] The Mayor stated that he was withholding his signature in order to give a group of disconcerted residents of Beacon Hill, the neighborhood bordering the Charles Street Jail, an opportunity to propose a new plan for a replacement facility.[258] One day before the closing date, the Mayor reluctantly signed the $15,400,000 loan order,[259] and Judge Garrity vacated the court's injunction against use of the Charles Street Jail after October 2, 1978.[260] On October 2, 1978, the district court held that the Mayor, City Councillors and Commissioner of Correction had proposed an acceptable plan for construction of a new jail as required by the First Circuit's opinion of March 17, 1978,[261] and therefore that pretrial detainees could continue to be housed at the Charles Street Jail pending further order of the court concerning an interim facility.[262]

The October 2, 1978 Memorandum and Order in *Inmates V*[263] materially altered the status of the Charles Street Jail litigation. In that order the district court stressed that "[t]he city, county and state defendants *shall without delay take all steps reasonably necessary* to carry out the provisions of said preliminary, modified and final architectural program and estimated design schedule."[264] Ironically, after six years of implementation, the defendants were under a remedial order which closely paralleled the "all deliberate speed" order of *Brown II*.[265] While addressing the plaintiffs' rights

[254] Memorandum and Orders Oct. 2, 1978, *supra* note 253, at 2; see also text at notes 213-17, *supra*.

[255] Memorandum and Orders Oct. 2, 1978, *supra* note 253, at 2-3.

[256] Boston Globe, September 29, 1978 at 14, col. 1.

[257] Boston Globe, September 30, 1978 at 1, col. 1.

[258] *Id.*

[259] Boston Globe, October 2, 1978 at 3, col. 3.

[260] Order Vacating Injunction and Notice, Inmates of the Suffolk County Jail v. Kearney, No. 71-162-G (D. Mass. October 2, 1978).

[261] See text at notes 213-17, *supra*.

[262] Memorandum and Orders Oct. 2, 1978, *supra* note 253, at 3.

[263] Memorandum and Orders Oct. 2, 1978, *supra* note 253.

[264] *Id.* at 4 (emphasis added).

[265] See text at notes 55-57, *supra*.

through implementation of the City Plan, the order is also sufficiently vague to accommodate the defendants' rights to local control of their institutions by determining the details of compliance. Because the City Plan which Judge Garrity approved specifies only the basic conditions of confinement,[266] it will in all likelihood require modification as its development proceeds.[267] If implementation of the City Plan proves more costly than has been anticipated,[268] and the City Council and the Mayor then refuse to appropriate additional funds, the district court will be forced to once again balance the plaintiffs' right to incarceration in a facility meeting due process standards against the defendants' rights to local control of their institutions. However, since implementation proceedings have already spanned six years, this balancing process should favor the plaintiffs. Moreover, since future implementation delays will relate only to the City Plan, a funding order directed at enforced compliance with this plan would clearly be within the scope of the district court's equitable powers. Such a funding order would directly parallel *Griffin v. County School Board of Prince Edward County,*[269] where extreme intransigence on the part of the defendants prompted the Supreme Court to hold that the district court could order local officials to levy taxes in order to finance desegregation.[270]

6. Possible Future Enforcement Procedures

a. Contempt Charges

If enforcement of the City Plan becomes necessary,[271] several en-

[266] Memorandum and Orders Oct. 2, 1978, *supra* note 253, at 2-3.

[267] In fact, The Suffolk County Detention Center, Charles Street Facility Architectural Program dated January 1, 1979, which elaborates upon the skeletal City Plan, notes the need for futher evaluations regarding structural stability, heating, ventilation and air conditioning, architectural considerations, site issues, construction phasing, and operating costs.

[268] This contingency is distinctly possible and even probable. Both the St. Louis architectural firm retained to draft the plan and the State Correction Department expressed doubts about the adequacy of the $15,400,000 loan orders. Boston Globe, September 29, 1978 at 14, col. 1.

[269] 377 U.S. 218 (1964).

[270] See text at notes 48-50, *supra.*

[271] In light of the Consent Decree signed by all the parties on May 7, 1979, Consent Decree, Inmates of the Suffolk County Jail v. Kearney, No. 71-162-G (D. Mass. May 7, 1979); see note 11, *supra,* if the city plan proves more costly than had been anticipated and the city defendants feel unable to appropriate the additional monies, they will move the court to modify the consent decree. The district court would probably deny this motion. If the defendants still refuse to appropriate additional funds, the district court will utilize one or a number of enforcement mechanisms.

forcement mechanisms will be available to the district court. First, the court may utilize the most conventional enforcement device and hold noncomplying defendants in civil contempt of court.[272] A court may impose civil contempt sanctions upon a finding that "defendants violated their obligations under the decree by failures of diligence, effective control, and steadfast purpose to effectuate the prescribed goals."[273] Moreover, while intent to violate the court order is not a necessary element of civil contempt,[274] the defendants' ability to comply is a prerequisite to imposition of a contempt sanction.[275] Contempt sanctions are generally an effective inducement to compliance because they are costly and, indirectly, because they are often accompanied by adverse publicity.[276] However, contempt sanctions have drawbacks as an enforcement mechanism. First, they increase antagonism between the defendants, possibly the public, and the court.[277] Second, they are least effective in cases, such as the Charles Street Jail litigation, where the remedies are complex, because an unwilling defendant can avoid sanctions by complying with direct court orders yet doing nothing more.[278] Third, civil contempt is merely a sanction and does not aid the defendants' compliance effort.

b. Appointment of a Receiver

A second mechanism which Judge Garrity might utilize to enforce the implementation of the City Plan entails placing the Charles Street Jail into receivership, just as was done by the District Court for the Middle District of Alabama in *Newman v. Alabama.*[279] In that case Judge Frank M. Johnson placed the Alabama prison system into receivership and appointed the Governor of the state as receiver. The court explained its action by stating that:

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[272] FED. R. CIV. P. 70 provides the court with the power to order civil contempt sanctions. *See generally* Goldstein, *supra* note 5, at 68 n.32a; Note, *supra* note 3, at 448-49; Special Project, *supra* note 3, at 838-41.

[273] Aspira of New York v. Bd. of Educ. of City of New York, 423 F. Supp. 647, 651 (S.D.N.Y. 1976), *cited in* Palmigiano v. Garrahy, 448 F. Supp. 659, 670 (D.R.I. 1978).

[274] Palmigiano v. Garrahy, 448 F. Supp. 659, 670 (D.R.I. 1978).

[275] *Id.* at 671; Special Project, *supra* note 3, at 839.

[276] Note, *supra* note 3, at 449.

[277] Special Project, *supra* note 3, at 839-40.

[278] *Id.* at 840. The Boston School desegregation litigation provides an example of "minimal compliance" by defendants under a contempt order. As a result of this tactic the court placed South Boston High School in receivership. See text at notes 279-93, *infra.*

[279] 466 F. Supp. 628 (M.D. Ala. 1979).

> time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. . . .
>
> There can be no doubt that the paramount duty of the federal judiciary is to uphold the law. That is why, when a state fails to comply with the Constitution, the federal courts are compelled to enforce it . . . . Regrettably, such enforcement orders result in the loss of some of the autonomy and flexibility the state might have exercised in the control of its public institutions had it chosen to accept the responsibility for their management before it was too late.[280]

Although receivership is more commonly used as a method for court supervision of a business in financial distress,[281] it has been employed by federal courts in two school desegregation cases,[282] and, on the authority of the desegregation cases, in a prison reform case.[283] In institution reform cases the receiver temporarily replaces the defendant officials and acts as an agent of the court for the limited purpose of assuring compliance with court orders.[284] For example, in the Boston school desegregation case the Court of Appeals for the First Circuit affirmed Judge Garrity's appointment of the superintendant of the school district in which South Boston High School is located as receiver.[285] The court found that receivership was a reasonable alternative in light of the defendants' noncompliance.[286] Moreover, the court cited a federal court's equitable powers and the similarities between the duties of receivers and those of masters and administrators, as support for its decision.[287] However, the court noted that because receivership was an extraordinary remedy it should be limited only to the duration of the conditions which necessitate its use.[288]

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[280] *Id.* at 635-36.

[281] Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976).

[282] Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1966).

[283] Newman v. Alabama, 466 F. Supp. 628, 635 (M.D. Ala. 1979). The court cited the following desegregation cases: Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1966).

[284] Special Project, *supra* note 3, at 836-37; Note, *Receivership as a Remedy in Civil Rights Cases,* 24 RUTGERS L. REV. 115, 132-33 (1969).

[285] Morgan v. McDonough, 540 F.2d 527, 535 (1st Cir. 1976); *see also* Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School,* 12 NEW ENG. L. REV. 55, 66 (1976).

[286] Morgan v. McDonough, 540 F.2d 527, 533-34 (1st Cir. 1976).

[287] *Id.* at 533.

[288] *Id.* at 535.

If the city defendants fail to implement the City Plan, receivership will be the most viable enforcement alternative available to the court. The court has the option of utilizing a variety of outside personnel to aid in enforcement, just as it had this option during the decree formulation and monitoring stages of the litigation.[289] However, since during the Charles Street Jail litigation the court had previously appointed a special master in a monitoring capacity,[290] a similar appointment at the enforcement stage would not be viewed by the defendants as a severe sanction. Moreover, the six year delay in implementation clearly constitutes an extraordinary circumstance; therefore, the court would be appropriate in escalating the intrusiveness of its outside agent and appointing a receiver. Furthermore, while enforced closing of the Charles Street Jail remains as an alternative, and is preferable because it does not introduce an additional outside party into the proceedings, receivership is both a less stringent and a more promising approach than a closing order.[291] The First Circuit noted the drawbacks of enforced closing in *Morgan v. McDonough*:[292]

> finally, it bears emphasizing that the principal alternative being suggested to the receivership order was to order that South Boston High be closed. That alternative would not only have involved the abandonment of a large and useful facility but would have necessitated the planning, expense, and inconvenience of finding places for some 2000 students. Without expressing any opinion on the propriety of ordering the School closed, it can be said that the district court demonstrated both restraint and wisdom in selecting the receivership option.[293]

Similar drawbacks would plague the enforced closing of the Charles Street Jail.

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[289] See note 144, *supra*.

[290] See text at note 179, *supra*.

[291] In Newman v. Alabama, Judge Johnson noted:

> There is, of course, a more extreme alternative to receivership. In *Pugh*, the court put defendants on notice that failure to comply with the minimum standards set forth in the order would necessitate the closing of several prison facilities. In light of that alternative, the more reasonable and the more promising approach is the appointment of Governor Fob James as receiver for the prison system.

Newman v. Alabama, 466 F. Supp. 628, 635 (M.D. Ala. 1979).

[292] 540 F.2d 527 (1st Cir. 1976).

[293] *Id.* at 534. It should also be noted that because Judge Garrity appointed a receiver in the Boston School desegregation case, there would probably be a tremendous public outcry if receivership were to be employed in the Charles Street Jail litigation.

c. Closing the Jail

Despite the preferred qualities of receivership the district court might choose to utilize the third and most extreme enforcement mechanism available to it—the enforced closing of the Charles Street Jail. Although the closing order in *Inmates V* was not enforced, those proceedings do illustrate both the brinksmanship involved in the implementation process following the court-ordered closing of a prison or jail, and the potential which closing orders have for expediting the defendants' compliance. By threatening the imminent closing of the Charles Street Jail, the district court and the court of appeals were, in effect, forcing the Mayor and City Council to resolve their political dispute and decide on a replacement facility. The Commissioner of Correction warned that, if the Mayor and City Council failed to agree on an alternate plan and adequate funding by October 2, 1978, and the jail was forced to close, "the facilities available . . . will become overcrowded, and the burden of relocating and maintaining the present inmates of Charles Street [the jail] will be a costly one. The City Council . . . must be prepared to pay such costs."[294] Undoubtedly, the city defendants had this warning in mind when they approved the City Plan for a new jail, and would likely continue to heed it should the district court close the Charles Street Jail as an enforcement device for an unimplemented City Plan.

Other prison and jail cases have successfully employed closing orders,[295] which are generally viewed by the courts as particularly

[294] Inmates of the Suffolk County Jail v. Kearney, slip op. at 4, No. 78-1216 (1st Cir. June 15, 1978).

[295] Courts have ordered the closing of offending institutions in the following cases: Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), 448 F. Supp. 659 (D.R.I. 1978) (civil contempt order); Rhem v. Malcom, 371 F. Supp. 594 (S.D.N.Y. 1974), 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd and remanded,* 507 F.2d 333 (2d Cir. 1974), *judgment entered,* 389 F. Supp. 964 (S.D.N.Y. 1975), *modified,* 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd per curiam,* 527 F.2d 1041 (2d Cir. 1975), 432 F. Supp. 769 (S.D.N.Y. 1977) (denying motion to reopen institution); Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976) (threatening to close prison unless defendants comply with minimum standards for confinement set forth in order), *aff'd in part and modified in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *reh. denied,* 564 F.2d 97 (5th Cir. 1977), 466 F. Supp. 628 (M.D. Ala. 1979) (receivership imposed); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974) (finding that abandonment of institution was necessary to relieve plaintiffs of mistreatment), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976) (requiring three-judge court), *rev'd and remanded,* 430 U.S. 322 (1977) (three-judge court not required), *modified,* 562 F.2d 993 (5th Cir. 1977), *reh. denied,* 565 F.2d 1215 (5th Cir. 1977); Martinez Rodriguez v. Jimenez, 409 F. Supp. 582 (D.P.R. 1976) (defendants enjoined from using jail as correctional institution), *stay denied,* 537 F.2d 1 (1st Cir. 1976), *aff'd,* 551 F.2d 877 (1st Cir. 1977).

stringent enforcement devices.[296] Just how stringent such orders can be is shown by the case of *Rhem v. Malcom*,[297] in which the District Court for the Southern District of New York ordered the "Tombs" jail closed due to the defendants' bad faith showing.[298] Even though the defendants did close the Tombs and transfer the inmates to the House of Detention on Rikers Island, several consequences flowed from the closing of the Tombs which compounded the stringency of the order. First, the district court held that plaintiffs' claims regarding the unconstitutional conditions at the Tombs were not mooted by transfer to Rikers Island,[299] and therefore ordered implementation at Rikers Island of those reforms ordered in the first *Rhem* opinion which were not tied to the Tombs facility.[300] Second, the

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[296] Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973).

> The Court does not now forsee that circumstances will arise which would require the Court to impose the ultimate sanction available to it, that of closing one or both of the prisons or enjoining the further reception of inmates at one or both institutions. Less rigorous, but effective, sanctions are available. The court can direct the discharge of offending employees; the Court can punish for contempt, and it can award attorney's fees and expenses of litigation. So far, the Court has avoided the imposition of sanctions and hopes that it will not have to impose any in the future; but, the sanctions are at hand, if needed.

[297] 371 F. Supp. 594 (S.D.N.Y. 1974); 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd and remanded*, 507 F.2d 333 (2d Cir. 1974), *judgment entered*, 389 F. Supp. 964 (S.D.N.Y. 1975), *modified*, 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd per curiam*, 527 F.2d 1041 (2d Cir. 1975), 432 F. Supp. 769 (S.D.N.Y. 1977) (denying motion to reopen institution) 440 F. Supp. 51 (S.D.N.Y. 1977)(denying motion to modify).

[298] Rhem v. Malcom, 377 F. Supp. 995, 996 (S.D.N.Y. 1974).

> The history of the case . . . has been one of frustration, largely caused by the City defendants' delay and the absence or incompleteness of reports or plans of performance. . . .
>
> Solely as a result of such noncompliance on the part of the City defendants, we are today entering an order that the City defendants close the tombs within thirty days. The order is subject to reconsideration at such time as the City defendants submit a 'comprehensive, detailed and specific plan' . . . .

Cited in Goldstein, *supra* note 5, at 71 n.332.

[299] Rhem v. Malcom, 389 F. Supp. 964, 968 (S.D.N.Y. 1975).

[300] *Id.* at 968-72. This order and the district court's order in Benjamin v. Malcom, No. 75 Civ. 3073 (S.D.N.Y. 1975), a separate case brought on behalf of inmates in the Rikers Island facility, extending the *Rhem* relief to all Rikers Island inmates, were consolidated on appeal and affirmed by the Second Circuit in Rhem v. Malcom, 527 F.2d 1041 (2d Cir. 1975) (per curiam). This remedy is particularly interesting because it would seem to be beyond the nature of the violations found in the Tombs. The court based this remedy on four findings of fact. It found that evidence has already been taken as to the conditions at Rikers Island, and that no showing had been made of a need for further discovery. Furthermore, the court had been instructed by the Second Circuit not to allow further delays. Most significantly, however, the court found that "the subject of the pending litigation is, as it has always been through its tortuous history, the rights to which plaintiff detainees are entitled under the

closing resulted in the defendants requesting the court to approve an "elaborate and impressive plan"[301] for a renovation of the Tombs in order to permit its use as a detention facility.[302] However, the court reaffirmed its decision to close the Tombs and denied the defendants' request, even though the court was of the opinion that the Tombs, if modified according to the City's proposed plan, would be adequate for use as a holding facility for detainees or perhaps for those inmates who knowingly consent to be housed there.[303]

The closing order in *Rhem* is distinguishable from the order in *Inmates V.* In *Rhem,* the defendants' bad faith was far more overt and the closing order was actually enforced. On the other hand, in the Charles Street Jail litigation, the defendants' bad faith was less obvious and their approval of the City Plan removed the need to enforce the closing order. Nonetheless, both cases illustrate the potential of closing orders as an enforcement mechanism which the district court may once again employ if the defendants fail to implement the City Plan.

IV. Conclusion

The Charles Street Jail litigation represents one of numerous institution reform cases in the increasingly important area of public law litigation. While the public law litigation model will secure vindication of plaintiffs' rights, this result will not be immediate. Rather, reform litigation under this model is necessarily protracted because the court must engage in the difficult process of balancing the plaintiffs' rights under the Constitution against the right of the defendants to local control of their institutions.

Under the public law litigation model, the court first finds a right-violation. It then issues an initial decree which is aimed at remedying that violation but which is also broad enough to allow the defendants to supply the details of compliance. In the first instance, the court unobtrusively monitors compliance; only if it determines that the defendants have exceeded the boundaries of good faith will the court actively intercede and use its equity powers to enforce its

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Constitution" and that these Constitutional rights "protect[s] people, not places." Rhem v. Malcom, 389 F. Supp. 964, 967 (S.D.N.Y. 1975). The source of the final portion of this quotation is Katz v. United States, 389 U.S. 347, 351 (1967), where the Court held that wiretapping the petitioner's conversation in a phone booth violated the Fourth Amendment.

[301] Rhem v. Malcom, 432 F. Supp. 769, 772 (S.D.N.Y. 1977).

[302] *Id.* at 770.

[303] *Id.* at 789.

decree. In order to facilitate the implementation process, the court may seek aid from the parties as well as from a variety of outside experts during the decree formulation and monitoring stages of the litigation, and may also employ numerous enforcement mechanisms.

The Charles Street Jail litigation exemplifies some of the pitfalls encountered by lower federal courts attempting to implement reforms in public law litigation. First, this litigation illustrates the importance of participation of parties to the litigation and outside the litigation in development of a well-defined initial decree. Next, the Charles Street Jail litigation illustrates some of the political and budgetary factors which complicate the implementation process in public law litigation, regardless of the breadth of the initial decree. Moreover, this litigation exemplifies the use of various monitoring aids, and the difficulty a court may encounter in making its discretionary determination regarding whether the defendants are exercising good faith in complying with the initial decree. Finally, the Charles Street Jail litigation provides a basis for an examination of a variety of enforcement mechanisms which a court may use to insure compliance with its initial decree and vindication of the plaintiffs' rights.

The implementation process takes time regardless of whether maximum use is made of the public law litigation model. However, given the complexities of the fundamental rights at stake and the problems encountered in implementing the remedy, the public law litigation model, if followed closely, will shorten this process and, therefore, remains the most effective method for handling institution reform cases.